SUPREME COURT, U. S.
JUL 24 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1233

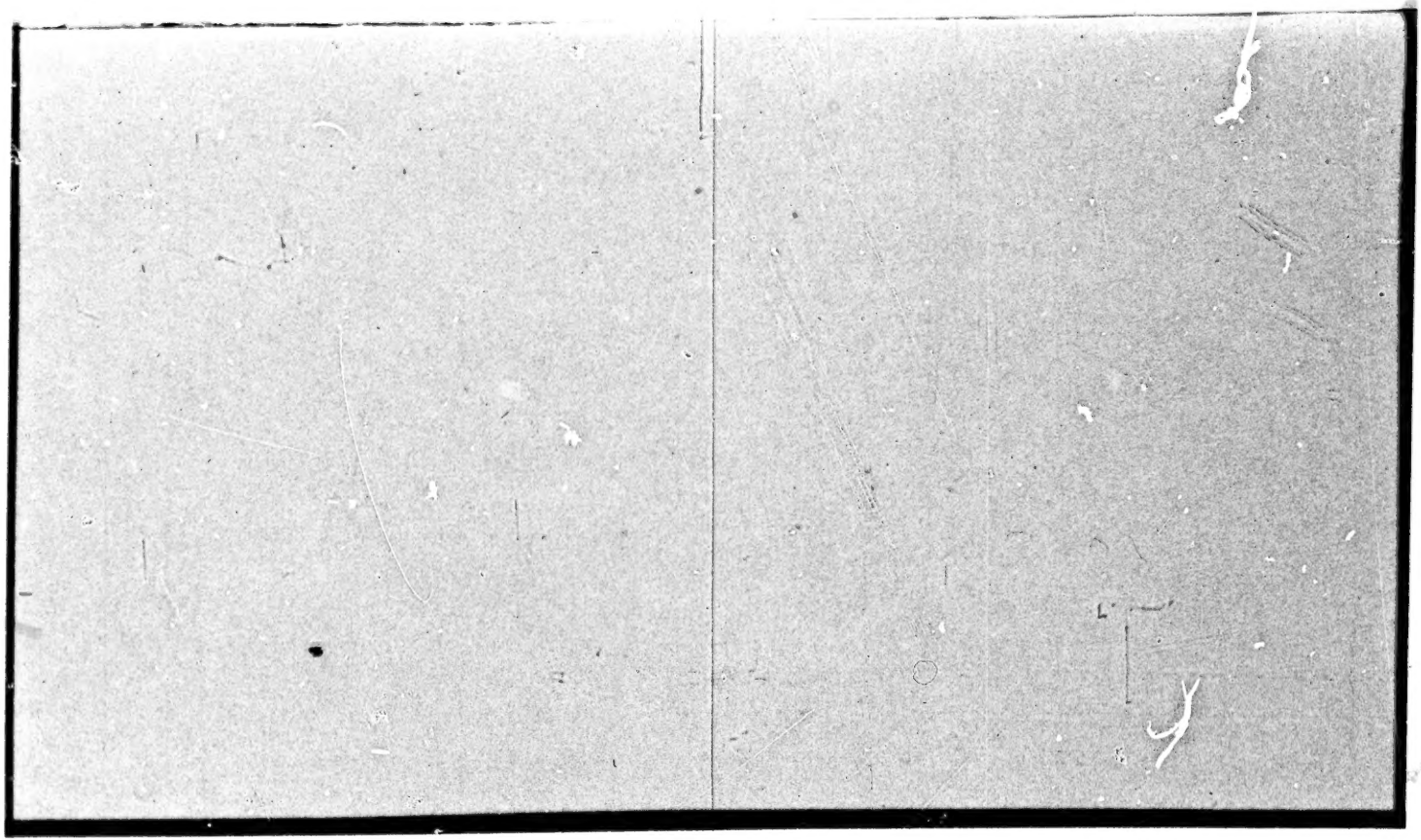
NATIONAL LABOR RELATIONS BOARD and PETER G. NASH, GENERAL COUNSEL,
Petitioners

—v.—

SEARS, ROEBUCK AND COMPANY,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 11, 1974
CERTIORARI GRANTED MAY 28, 1974



Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1233

NATIONAL LABOR RELATIONS BOARD and
PETER G. NASH, GENERAL COUNSEL,
Petitioners

—v.—

SEARS, ROEBUCK AND COMPANY,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

	Page
Relevant docket entries	1
Amended Complaint	4
Exhibits to Amended Complaint	12
Defendants' Answer to Amended Complaint	38
Exhibit to Defendants' Answer	42
Plaintiff's Statement of Material Facts	45
Exhibits to Plaintiff's Statement of Material Facts	54
Plaintiff's Motion for Preliminary Injunction	103
Affidavit of Gerard C. Smetana	105

	Page
Exhibits to Affidavit of Gerard C. Smetana	116
Affidavit of Jeffrey S. Goldman	137
Defendants' Statement of Genuine Issues	140
Plaintiff's Motion for Summary Judgment	142
Defendants' Cross-Motion for Summary Judgment	143
Portion of Points and Authorities in support of Defendants' Cross-Motion for Summary Judgment	144
Exhibit to Defendants' Cross-Motion for Summary Judgment	148
Appendices of Plaintiff's Opposition to Defendants' Cross-Motion	150
Notice of Appeal from District Court Order	213
Order of the Supreme Court granting petition for Certiorari	214

(The Memorandum and Order of the District Court, the Judgment of the Court of Appeals affirming the District Court, and the Order of the Court of Appeals denying Appellants' petition for rehearing were printed in the appendix to the petition for certiorari; and the 1961 Statement on "Operations of the Office of NLRB General Counsel" is printed in the appendix to the brief in opposition to the petition. These documents are not reprinted in this appendix.)

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Case No. 1571-71

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

8. 4.71	Complaint filed
10.14.71	Amended complaint filed
2. 4.72	Defendants' answer to amended complaint filed
2.11.72	Plaintiff's motion for preliminary injunction filed
2.18.72	Defendants' opposition to motion for preliminary injunction filed
3.17.72	Motion for preliminary injunction argued and granted
3.27.72	Findings of fact and conclusions of law and Order granting preliminary injunction entered
3.30.72	Defendants' request for stay of injunction pending appeal filed
3.30.72	Notice of appeal from Order of 3-27-72 filed
4. 6.72	Plaintiff's opposition to defendants' request for stay filed
4.23.72	Plaintiff's motion for summary judgment filed
6.21.72	Defendants' opposition and cross-motion for summary judgment filed
6.26.72	Plaintiff's opposition to cross-motion filed
7.17.72	Order denying stay of injunction entered
7.28.72	Motion and cross-motion for summary judgment argued
8.10.72	Memorandum and order granting plaintiff's motion for summary judgment and denying defendants' cross-motion entered
8.16.72	Notice of appeal from Order of 8-10-72 filed

Case No. 72-1870

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

9.18.72 Certified original record filed

5.29.73 Per curiam Order by the Clerk for the Court, *sua sponte* placing case on summary calendar

6.18.73 Argument held before Wilbur K. Miller, Sr. Circuit Judge, Wright and Robb, Circuit Judges

7.27.73 Judgment issued affirming judgment of the District Court on the basis of the opinion of District Judge Corcoran; stay ordered by District Court dissolved

8.10.73 Petition for rehearing and suggestion for rehearing *en banc* filed

8.14.73 Appellants' motion for stay of Order of July 27, 1973, filed

8.24.73 Per Curiam Order issued granting appellants' motion for stay of Order of July 27, 1973

9.13.73 Per Curiam Order issued denying petition for rehearing

9.13.73 Court's letter to parties advising that no judge requested a vote on suggestion for rehearing *en banc* and that no action was taken on said petition

9.20.73 Appellants' motion for stay of judgment pending filing of petition for certiorari filed

10.16.73 Per Curiam Order issued granting motion for stay of judgment

11.13.73 Per Curiam Order issued granting General Counsel's motion to substitute Peter G. Nash as a defendant-appellant for Eugene G. Goslee

11.20.73 Appellants' motion to extend stay of judgment filed

1. 4.74 Per Curiam Order staying effectiveness of judgment, issued

* * * *

2.11.74 Petition for writ of certiorari filed in the Supreme Court

5.28.74 Order of the Supreme Court granting petition for certiorari issued

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1571-71

SEARS, ROEBUCK AND CO., on its own behalf and on behalf of other charging parties under the National Labor Relations Act,

925 South Homan Avenue
Chicago, Illinois 60607
312-265-5352

PLAINTIFF

v.

THE NATIONAL LABOR RELATIONS BOARD and EUGENE G. GOSLEE, Acting General Counsel, on his own behalf and as agent for the NATIONAL LABOR RELATIONS BOARD,

1717 Pennsylvania Avenue, N.W.
Washington, D. C.
393-3111

DEFENDANTS

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

SEARS, ROEBUCK AND CO., plaintiff, by its attorneys, Alan Raywid, Lawrence M. Cohen and Gerard C. Smetana, for its complaint against the NATIONAL LABOR RELATIONS BOARD and EUGENE G. GOSLEE, Acting General Counsel, on his own behalf and as agent for the NATIONAL LABOR RELATIONS BOARD, defendants, alleges as follows:

1. This action arises under the Freedom of Information Act, 5 U.S.C. 552, as here after more fully appears.

2. This Court has original jurisdiction of this action under 5 U.S.C. 552(a)(3); 28 U.S.C. 1337; the All Writs Act, 28 U.S.C. 1651; 5 U.S.C. 703; and the Federal Declaratory Judgment Act, as amended, 28 U.S.C. 2201-02.

3. Plaintiff brings this action on its own behalf and on behalf of other persons similarly situated pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. The class which plaintiff represents is so numerous that joinder of all members is impracticable. It is composed of all persons, such as plaintiff, who have been denied and continue to be denied by defendants access to the records of the National Labor Relations Board, hereafter described, notwithstanding that such records constitute precisely the kinds of "final opinions, statements of policy and interpretations" and "instructions to staff that affect a member of the public" which the Freedom of Information Act (5 U.S.C. Sec. 552(a)(2)(A)(B) and (C)) requires defendants to index and make available to the public. In view of defendants' uniform and consistent refusal to make said records available to both plaintiff and the public, a common question of law and fact is raised in this proceeding affecting the rights of all members of the class who are, and continue to be, adversely affected by the practice complained of herein. Further, defendants' actions with respect to plaintiff, as hereafter described, were predicated on grounds generally applied to all members of the class, thereby making appropriate final injunctive relief with respect to the class as a whole. As a member of said class, plaintiff will fairly and adequately protect the interests of the class in this proceeding.

4. Plaintiff is a domestic corporation organized and existing under and by virtue of the laws of the State of New York.

5. Defendant National Labor Relations Board (hereafter "Board") is an independent Federal agency created and existing under the National Labor Relations Act, as amended, 29 U.S.C. 141, *et seq.* (hereafter "Labor Act"), with its principal offices in Washington, D.C.

6. Defendant Eugene G. Goslee (hereafter "Goslee") was at all times material herein, specifically during the period from June 25, 1971 to and including August 24, 1971, the Acting General Counsel of the National Labor Relations Board, an office created by and existing under

Section 3(d) of the Labor Act, with principal offices in Washington, D.C., and as such was empowered, on the Board's behalf, to issue or refrain from issuing unfair labor practice complaints under Section 10 of the Labor Act (a power which has been delegated to the Board's Regional Directors, see Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, 29 C.F.R. 102.15) and, pursuant to Section 102.117(c) of the Board's Rules and Regulations, series 8, as amended, 29 C.F.R. 102.117(c), to receive and answer requests for agency records.

7. Arnold Ordman (hereafter "Ordman") was from 1963 to and including June 25, 1971 and Peter C. Nash (hereafter "Nash") is and has been subsequent to and including August 24, 1971 the General Counsel of the Board with the same powers and duties as described in paragraph 6 above. The past practice of Ordman and the present practice of Nash, with respect to the disclosure of the agency records here involved, has been and is the same as that of Goslee as hereafter described.

8. The Regional Advice Branch of the Office of the General Counsel of the Board (hereafter "Advice Branch") is located in Washington, D.C. It has responsibility, under the supervision of the Board's General Counsel, to review requests by the Board's Regional Directors for advice and to formulate policy on novel or unsettled procedural and substantive matters arising in unfair labor practice cases. Section 201.1.1 of the Board's Statements of Procedure, series 8, as amended, 32 C.F.R. 9588. In this capacity, the Advice Branch issues mandatory instructions to said Regional Directors with respect to the disposition of unfair labor practice charges and the issuance of unfair labor practice complaints. Said mandatory instruction, along with the precedence, theories and analyses in support thereof and occasional references to relevant prior Advice determination, are communicated to the Regional Directors by means of a memorandum (hereafter "Advice Memorandum").

9. The Office of Appeals of the Office of the General Counsel of the Board (hereafter "Office of Appeals") is located in Washington, D.C. It has responsibility to re-

view appeals from the refusal of a Regional Director to issue an unfair labor practice complaint and, under the supervision of the Board's General Counsel, to sustain or reverse said refusal. Section 202.1.2 of the Board's Statements of Procedure, series 8, as amended, 32 C.F.R. 9588; Section 102.19 of the Board's Rules and Regulations, series 8, as amended, 29 C.F.R. 102.19. Said determination of the Office of Appeals, along with the precedence, theories and analyses in support thereof and occasional references to releavnt prior Appeals determination, are communicated to the Regional Directors by means of a memorandum (hereafter "Appeals Memorandum").

10. It has been the uniform and consistent practice of the defendants, as well as Ordman and Nash, to refuse to make available to the public Advice and Appeals Memoranda, and indices thereof, on the ground that such records are not subject to disclosure under the Freedom of Information Act. Report of Committee on Practice and Procedure under the National Labor Relations Act, American Bar Association Section of Labor Relations Law, Vol. II, 1971 (hereafter "1971 Report"), pp. 233-237, 242-246; Report of Committee on Practice and Procedure Under the National Labor Relations Act, American Bar Association Section of Labor Relations Law, Vol. II, 1970 (hereafter "1970 Report"), pp. 5-10. This position has been maintained despite the contrary position adopted by the American Bar Association Section of Labor Relations Law. 1971 Report, pp. 233-237, 242-6; 1970 Report, pp. 5-10. The events described in paragraph 11-14 *infra*, involving plaintiff, are illustrative and typical of said practice of refusing to make available Advice and Appeals Memorandum and indices thereof. A similar result would have occurred if any other member of the class which plaintiff here represents had made requests of defendant such as those of plaintiff described in paragraphs 11 and 13 *infra*. Said requests would also have been denied, as were plaintiff's as described in paragraphs 12 and 14 *infra*.

11. On or about June 10, 1971, pursuant to mandatory instructions received from the Advice Branch in an

Advice Memoranda, the Regional Director for the Nineteenth Region of the Board informed plaintiff that he was refusing to issue a complaint with respect to the unfair labor practice charges filed by plaintiff in Board Case No. 19-CB-1673. A copy of said lecter is attached hereto and made a part hereof as Exhibit "A". On or about July 14, 1971, plaintiff, in order to perfect its right to appeal said determination to the Office of Appeals and acting under the Freedom of Information Act and in compliance with the applicable Board rules, filed a Request for Information (hereafter "Request") with defendant Board through defendant Goslee. In said Request, plaintiff requested that the Board, in accord with the Freedom of Information Act, make available for public inspection and or copying the Advice Memorandum in Case No. 19-CB-1673, other relevant Advice and Appeals memoranda, and the indices thereof, all as more fully described in the Request which is attached hereto and made a part hereof as Exhibit "B".

12. On or about July 22, 1971, Goslee, on behalf of the Board and pursuant to the practice described in paragraph 10 above, by teletype to plaintiff as confirmed by a letter of explanation dated the next day, refused to make available to plaintiff any of the information sought in its Request. A copy of said teletype and letter are attached hereto and made a part hereof as Exhibits "C" and "D", respectively.

13. On or about July 28, 1971, plaintiff was informed in greater detail by the Regional Director for the Nineteenth Region of his reasons for refusing to issue complaint but said letter also failed to make aavilable to plaintiff the information sought in its Request. A copy of said letter is attached hereto and made a part hereto as Exhibit "E". On or about July 29, 1971, plaintiff, again in order to perfect its right to appeal said determination to the Office of Appeals and acting under the Freedom of Information Act and in compliance with the applicable Board rules, filed a Renewed Request for Information (hereafter "Renewed Request") with defendant Board through defendant Goslee. In said Renewed Request, plaintiff repeated its Request to the Board in

accord with the Freedom of Information Act, clarified where necessary its Request, and answered each of the reasons Goslee had proferred for denying the Request, all as more fully described in the Renewed Request attached hereto and made a part hereof as Exhibit "F".

14. On or about August 4, 1971, Goslee, on behalf of the Board and pursuant to the practice described in paragraph 10 above, by letter to plaintiff, refused to make available to plaintiff any of the information sought in the Renewed Request. A copy of said letter is attached hereto and made a part hereof as Exhibit "G". In order to comply with the applicable time requirements and expressly reserving its rights involved herein, plaintiff under protest then timely filed its appeal in Case No. 19-CB-1673 with the Office of Appeals. Although plaintiff's appeal was thereafter sustained and complaint in Case No. 19-CB-1673 issued, neither said determination of the Office of Appeals nor said complaint, which are attached hereto and made a part hereof as Exhibits "H" and "I", respectively, made available to plaintiff the information sought in its Request and Renewed Request and nor, to date, has such information been made available to plaintiff in any other manner by Goslee, Nash or any other agent of the Board.

15. The practice of the defendants as described in paragraph 10 above, as applied to plaintiff by denying its Request and Renewed Request as described in paragraphs 12 and 14 above, has deprived and continues to deprive plaintiff and the class it represents of necessary and valuable rights in violation of the Freedom of Information Act. They have been and are being denied their right to Advice and Appeals Memoranda and indices thereof and by such denial are being preluded, *inter alia*, from ascertaining the policies and law that are being adhered to by the General Counsel of the Board.

16. There is no remedy other than by this action by which plaintiff and the class it represents can receive just and equitable relief and prevent defendants from continuing to deprive them of information to which they are entitled under the Freedom of Information Act. The foregoing allegations thus set forth an actual controversy

and are matters of public interest, which a declaratory judgment construing the applicability of the Freedom of Information Act in the circumstances here involved will settle and terminate.

WHEREFORE, plaintiff prays this Court to enter a decree which:

(a) Declares that the failure of defendants to provide plaintiff and the class it represents with Advice and Appeals Memoranda and indices thereof, such as requested in plaintiff's Request and Renewed Request, deprives plaintiff and the class it represents of necessary and valuable statutory rights in violation of the Freedom of Information Act.

(b) Grants plaintiff and the class it represents a permanent injunction enjoining the defendants, their employees, agents, servants, officers, and attorneys from continuing to abridge their rights by refusing to supply plaintiff and the class it represents with Advice and Appeals Memoranda and indices thereof such as requested in plaintiff's Request and Renewed Request.

(c) Grants plaintiff and the class it represents such other and further relief as is deemed to be just and equitable in the premises.

ALAN RAYWID
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D. C. 20006
Telephone 202/659-9750

GERARD C. SMETANA
925 So. Homan Avenue
Chicago, Illinois 60607
Telephone 312/265-5352

LAWRENCE M. COHEN
LEDERER, FOX & GROVE
111 West Washington Street
Chicago, Illinois 60602
Telephone 312/641-0200

Of Counsel:

COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D. C. 20006
Telephone 202/659-9750

LEDERER, FOX & GROVE
111 West Washington Street
Chicago, Illinois 60602
Telephone 312/641-0200

EXHIBIT "A"

NATIONAL LABOR RELATIONS BOARD

REGION 19

[Logo]

1000 Republic Building, 1511 Third Avenue
Seattle, Washington 98101
June 10, 1971 Telephone (206) 442-4532

Philip C. Lederer, Attorney at Law
111 W. Washington Street
Chicago, Illinois 60602

Re: Retail Clerks Union Local No. 4
Case No. 19-CB-1673

Dear Mr. Lederer:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

The investigation discloses that the Employer's attempted withdrawal from the Silver Bow Employers Association was untimely, in that the investigation disclosed negotiations were already in progress at the time of the attempted withdrawal. Accordingly, further proceedings are not warranted and I am, therefore, refusing to issue complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel of the National Labor Relations Board, Washington, D. C. 20570 and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D. C., by the close of business on June 23, 1971. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. A copy of any such request for extension of time should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Director within the time stated above.

Very truly yours,

/s/ Charles M. Henderson
CHARLES M. HENDERSON
Regional Director

Encls.

CERTIFIED MAIL NO. 909905
RETURN RECEIPT REQUESTED

cc: General Counsel, National Labor Relations Board, Washington, D.C. 20570
Retail Clerks Union Local No. 4, 125 W. Granite, Butte, MT 59701
Sears, Roebuck and Co., 32 E. Granite Street, Butte, MT 59701
Retail Clerks International Association, 2819 First Ave., Seattle, WA 98121

EXHIBIT "B"

July 14, 1971

Mr. Eugene G. Goslee
Acting General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D. C. 20570

Re: Retail Clerks Union, Local No. 4,
Retail Clerks International Association,
AFL-CIO, (Sears, Roebuck and Co.),
Case No. 19-CB-1673

Dear Mr. Goslee:

By letter dated June 10, 1971, a copy of which was sent to you, the Nineteenth Region of the Board refused to issue a complaint in the above-captioned case. Accordingly, the charge filed by our client, Sears, Roebuck and Co., was dismissed. The only basis for this decision disclosed in said letter, or at any time, was that "the Employer's attempted withdrawal from the Silver Bow Employers Association was untimely, in that . . . negotiations were already in progress at the time of the attempted withdrawal." Sears, as the charging party, has never been informed of either the factual or legal basis for this conclusion of the Nineteenth Region. We have been advised, however, that the decision of the Region was predicated on mandatory instructions contained in a memorandum received from the Advice Branch of the Board.

Pursuant to Section 102.19 of the Board's Rules and Regulations, we intend to seek review of the refusal to issue complaint in this matter by filing an appeal with the Board's Office of Appeals. An extension of time has been granted until the close of business on July 23, 1971 to file such an appeal. As you know, the appeal, under Section 102.19, must "contain a complete statement setting forth the facts and reasons upon which it is based."

In our opinion, it is impossible to comply with the requirements of Section 102.19 and prepare a comprehensive and persuasive appeal without a fuller explanation

as to the basis for the Region's refusal to issue complaint. Accordingly, pursuant to the Freedom of Information Act (5 U.S.C. Section 552) and Section 102.117 of the Board's Rules and Regulations, we request that you promptly make available for public inspection and/or copying the identifiable records described below:

1. We request the specific memorandum submitted by the Advice Branch to the Nineteenth Region which resulted in the Region's refusal to issue a complaint in the instant matter. This action by the Advice Branch, which the Region was required to and did follow, constitutes final agency action of precedential import. 1970 Report of the Labor Relations Law Section, American Bar Association, pp. 6-10. As such, the memorandum constitutes a public document under the Freedom of Information Act. See, e.g., *American Mail Line Ltd.* v. *Gullick*, 411 F. 2d 696 (D.C. Cir. 1969) and *Benson* v. *GSA*, 289 F.Supp. 590, 591 (N.D. Wash. 1968), *aff'd*, 415 F. 2d 878, 881 (9th Cir. 1969). It should be noted that analogous memoranda of the Security and Exchange Commission, pursuant to the recommendation of the Administrative Law Conference of the United States (38 LW 2657, 2658), are now made available for public inspection and copying. 17 C.F.R. 200.81. We believe that the public generally and a charging party, in particular, has a right to know the operative facts and underlying relationale which constitute the basis for the General Counsel's determination not to proceed to complaint. In the present case, such information is only available in the memoranda of the Advice Branch to the Nineteenth Region.

2. During the oral argument of the present case before the Advice Branch, counsel for Sears was informed by Advice Branch representatives of allegedly similar cases in which the Advice Branch had also instructed Regional offices to dismiss charges. Since these memoranda are not published, it is necessary, in order to prepare a meaningful appeal and understand the rationale of the Advice Branch here, that

we have access to all Advice and Office of Appeals memoranda issued within the past five years which involve issues similar to those in the instant case. In the absence of reported Board decisions presenting the same question as raised in this case, such memoranda constitute, in effect, the Board's decisional law on the issue here involved. For purposes of identification, we would define those categories of memoranda requested to include *at least* those cases involving either the propriety of withdrawals by employers or unions from multi-employer bargaining, disputes as to commencement date of negotiations, or conflicting interpretations in any other context of the Board's *Retail Associates* (120 NLRB 388) rule.

3. For similar reasons, we request the index or digest of all determinations rendered by the Advice Branch and Office of Appeals in either their existing form or any alternative form which realistically permits identification of relevant records. As noted in Professor Davis' book (p. 206):

> ". . . opinions of [the Office of Appeals] are the only available precedents on some questions. They are indexed and freely used within the office, along with similar opinions given by the Advice Branch . . . in response to requests from Regional Officers for guidance on questions of law and policy. From the Advice and Appeals opinions, the General Counsel's office compiled a 'Book of Digests' for the guidance of the staff on issues about which the General Counsel's decisions constitute the only relevant law . . ."

This "Book of Digests," or other orderly filing and indexing system, manifestly constitutes "precedents" and the kind of "final opinions, statements of policy and interpretations", and "instructions to staff that affect a member of the public", which the Freedom of Information Act contemplates should be indexed and made available to the public. Again, note that the SEC, under Section 201.81(b) of its Rules as

adopted on January 25, 1971, provides the public with essentially the same indices which we here request from the Board.

Please advise the undersigned of the time and place the information described above will be made available for inspection and/or copying and inform us of the reasonable fees, if any, required to reimburse the Board for the costs incurred in connection with this request. Should you determine that any portion of this request will not be granted, we would request that, pursuant to Section 102.117(c) of the Board's Rules, we be sent prompt notice of such a determination accompanied by a written statement of the reasons therefor.

Since the information sought to be elicited herein is essential to the preparation of the appeal in the instant case, we have concurrently herewith requested the Office of Appeals to toll the time for filing said appeal pending your ruling on the requests herein made.

Very truly yours,

LEDERER, FOX AND GROVE

By _____

LAWRENCE M. COHEN
Attorneys for Sears,
Roebuck and Co.
Charging Party

LMC:hy

cc Mr. Irving M. Herman
Director, Office of Appeals
National Labor Relations Board
Office of the General Counsel
Washington, D. C. 20570

Mr. Charles M. Henderson
Regional Director, Region 19
National Labor Relations Board
1000 Republic Bldg., 1511 Third Ave.
Seattle, Washington 98101

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

EXHIBIT "C"

[27132 CHLAC

RAAUIJAZ RUEVDEL0009 2052025-UUUU—
RUCHLAC.
NLRB

FM EUGENE G GOSLEE ACTING GENERAL COUNSEL NLRB WASH DC

TO LAWRENCE M COHEN ESQ LEDERER FOX & GROVE CHICAGO TITLE & TRUST BLDG 111 WEST WASHINGTON ST CHICAGO ILL 60602

BT

RE RETAIL CLERKS UNION, LOCAL NO. 4, RETAIL CLERKS INT'L ASSN AFL-CIO (SEARS, ROEBUCK & CO), CASE NO. 19-CB-1673.

RE YOUR LETTER OF JULY 14, 1971, REGIONAL DIRECTOR WILL SEND YOU LETTER SHORTLY SETTING FORTH WITH GREATER PARTICULARITY REASONS FOR HIS REFUSAL TO ISSUE COMPLAINT IN SUBJECT CASE. OFFICE OF APPEALS WILL NOTIFY YOU REGARDING TIME TO FILE ANY APPEAL YOU MAY WISH TO FILE AFTER RECEIPT OF ABOVE LETTER. WITH RESPECT TO YOUR REQUESTS FOR (1) ADVICE BRANCH MEMORANDUM IN SUBJECT CASE; (2) ACCESS TO ANY ADVICE BRANCH AND OFFICE OF APPEALS MEMORANDA IN CASES SIMILAR TO INSTANT ONE; AND (3) "THE INDEX OR DIGEST OF ALL DETERMINATIONS RENDERED BY THE ADVICE BRANCH AND OFFICE OF APPEALS . . .", SUCH REQUESTS ARE RESPECTFULLY DENIED. REASONS FOR SUCH DENIAL WILL BE SET FORTH IN LETTER TO FOLLOW.

BT

NNNN

[27131 CHLAC

[Confirmation Copy: This is a confirmation of a message telephoned to FW on 7/22 at 3:25 P.M., General Services Administration, Transportation & Communications Service, Teletype 353-5520. Message telephoned by TC]

EXHIBIT "D"

[Logo] NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570 Jul. 23, 1971

Lawrence M. Cohen, Esquire
Lederer, Fox and Grove
Chicago Title and Trust Building
Chicago, Illinois 60602

Re: Retail Clerks Union, Local No. 4,
Retail Clerks International
Association, AFL-CIO
(Sears, Roebuck and Co.)
Case No. 19-CB-1673

Dear Mr. Cohen:

This letter is written in response to your letter of July 14, 1971, and pursuant to my teletype to you of July 22, 1971.

With respect to the denial of your request for the Regional Advice memorandum in the subject case, disclosure of Regional Advice Branch memoranda is not required under the Freedom of Information Act (5 U.S.C. Sec. 552) since such memoranda do not constitute a final disposition of a case but are rather guides for a Regional Director as to how a specific case is to be handled. Such memoranda are also privileged against disclosure under 5 U.S.C. Sec. 552(b)(5) since they are intra-agency memoranda which reflect the thought processes and legal analyses of the General Counsel's staff. See *International Paper Co.* v. *Federal Power Commission*, 438 F. 2d 1349, 1358, 1359. In addition, Advice Branch memoranda constitute an integral part of the investigative process and become part of the investigative file. See 5 U.S.C. Sec. 552(b)(7). The foregoing are the reasons for denying your request for the Advice Branch memorandum in the subject case.

For the same reasons I also denied your request for access to all Advice Branch memoranda in cases similar to the instant one.

With respect to the denial of your request for "the index or digest of all determinations rendered by the Advice Branch", there is no digest system for Advice Branch memoranda. Although the memoranda are collected and filed according to the issues raised in each case for use by the Advice Branch staff as a research tool, these memoranda, individually or collected, will not be disclosed for the reasons already set forth above.

With respect to your request for decisions of the Office of Appeals in cases similar to the instant one, you are aware, of course, that the disposition of an appeal is explained in a letter sent to all interested parties. No subject index, compilation, or book of digests of these letters is maintained. Accordingly, there can be no retrieval of Office of Appeals decisions in cases similar to the instant one and thus I am unable to comply with your request in this regard. For the same reason, I am unable to comply with your request for "the index or digest of all determinations rendered by . . . the Office of Appeals".

Should you have any questions with respect to this letter or the previous teletype, please do not hesitate to call on me.

Very truly yours,

/s/ Eugene G. Goslee
EUGENE G. GOSLEE
Acting General Counsel

EXHIBIT "E"

NATIONAL LABOR RELATIONS BOARD

REGION 19

[Logo]

1000 Republic Building, 1511 Third Avenue
Seattle, Washington 98101
July 26, 1971 Telephone (206) 442-4532
442-7542

Mr. Lawrence M. Cohen
Lederer, Fox and Grove
Attorneys at Law
Chicago Title and Trust Bldg.
111 W. Washington Street
Chicago, Illinois 60602

Re: Retail Clerks Int'l Assn #4
Case 19-CB-1673

Dear Mr. Cohen:

This letter sets forth with greater particularity my reasons for refusing to issue complaint in the above-captioned case and is sent pursuant to the teletype of July 22, 1971 from Acting General Counsel Goslee to you.

As a result of the investigation, I have concluded that further proceedings on the charge are unwarranted inasmuch as the employer's attempted withdrawal from the multi-employer unit occurred after the commencement of actual bargaining or negotiations in that unit and was thus untimely under the test enunciated in *Retail Associates*, 120 NLRB 388.[1] The evidence disclosed that the employer's attempted withdrawal took place after the parties to the multi-employer bargaining relationship (Silverbow Employers Association and the union) had exchanged proposals for a new contract, which exchange was, in the particular circumstances

[1] See also *Sheridan Creations*, 148 NLRB 1503; *Seattle Automotive Wholesalers Assn*, 140 NLRB 1393. Cf. *Eberlee Builders*, 186 NLRB No. 8.

of the instant case, viewed as the commencement of actual bargaining. In this letter it was noted that the exchange of proposals occurred pursuant to the provisions of Article XVIII of the expired contract which required such exchange and which provided that the exchanged proposals are to frame the issues for negotiations to the exclusion of all others and it appears that any matters not raised in the exchange of proposals are to be included without change in the subsequent contract. Thus, upon receipt of the Association's counterproposals, the parties were considered to have "agreed" to the substantial number of matters not raised in either the union's proposal or the Association's proposal. At the time of such "agreement," actual bargaining negotiations were considered to have commenced and the employer's subsequent multi-employer unit was considered to be untimely. In view of this conclusion, the union's request to bargain on an individual basis was deemed not violative of Section 8(b)(3) of the Act. I am therefore refusing to issue a complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel of the National Labor Relations Board, Washington, D.C. 20570, and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D.C. by the close of business on August 9, 1971. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. A copy of any such request for extension of time should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and sent one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel

and a copy of the appeal with the Regional Director within the time stated above.

Very truly yours,

/s/ Charles M. Henderson
CHARLES M. HENDERSON
Regional Director

cc: General Counsel, National Labor Relations Board, Washington, D.C. 20570; Sears, Roebuck and Co., 32 E. Granite Street, Butte, Montana 59701; Retail Clerks Local No. 4, 125 W. Granite, Butte, Montana 59701; Retail Clerks Intl Assn, 2819 First Ave.—Vanderveer Bldg., Seattle, WA 98121

CERTIFIED MAIL No. 909993. Return receipt requested.

EXHIBIT "F"

LEDERER, FOX AND GROVE
ATTORNEYS AT LAW
Chicago Title and Trust Building
111 West Washington Street
Chicago, Illinois 60602

Philip C. Lederer
Shayle P. Fox
Kalvin M. Grove
Lawrence M. Cohen

S. Richard Pincus
Herbert M. Berman
Russell M. Kofoed
K. Bruce Stickler
David L. Evans

Area Code 312
Telephone 641-0200

July 29, 1971

Mr. Eugene G. Goslee
Acting General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N. W.
Washington, D. C. 20570

Re: Retail Clerks Union, Local No. 4,
Retail Clerks International Association,
AFL-CIO, (Sears, Roebuck & Co.),
Case No. 19-CB-1673

Dear Mr. Goslee:

On July 14, 1971 we wrote to you on behalf of our client, Sears, Roebuck and Co., the charging party in the above captioned case, requesting, pursuant to the Freedom of Information Act (5 U.S.C. § 552) and § 102 .117 of the Board's Rules and Regulations, that you promptly make available for public inspection and/or copying various records described in detail in our letter. The basis for our request was, *inter alia*, that without such records it was impossible to comply with the requirements of § 102.19 of the Board's Rules and Regulations and prepare a comprehensive and complete appeal of the refusal by the Regional Director for the

Nineteenth Region to issue a complaint in the instant case.

By teletype dated July 22 you advised us that our requests were denied but that we would receive a further letter from the Regional Director "setting forth with greater particularity reasons for his refusal to issue complaint in subject case". We were further advised that the reasons for the denial of our requests would be described in a letter to follow. We have now received your letter of July 23 stating the reasons for your action and the Regional Director's letter of July 28, a copy of which was sent to you, indicating "in greater particularity" the reasons for his refusal to issue complaint in the instant case. The time for filing an appeal has been extended until August 9, 1971.

After a careful consideration and analysis of both your letter of July 23 and the Regional Director's letter of July 28, we have again concluded that a comprehensive and meaningful appeal cannot be filed in the present case without the information requested in our letter of July 14. Accordingly, for this reason and because we believe that we are entitled to such information under the Freedom of Information Act as described below, we hereby renew the requests set forth in our letter of July 14. We do not believe that the reasons set forth in your letter of July 23 permit a refusal to disclose the information we have requested:

1. As set forth in paragraph 1 on page 2 of our July 14 letter, we believe that the American Bar Association, Labor Relations Law Section was correct when it stated in its 1970 Report (Vol. II, p. 7) that Advice and Appeals opinions "constitute precisely the kinds of 'final opinions, statements of policy, and interpretations,' and 'instructions to staff that affect a member of the public,' which the Freedom of Information Act contemplates should be indexed and made available to the public, 5 U.S.C. § 552(a)(2)(A), (B), and (C)." We note in this regard that, under the Board's view as well as that of prevailing authority, a determination by the General Counsel not to litigate is not reviewable in either state or federal courts. See Mr. Justice Douglas'

dissent in *Amalgamated Association* v. *Lockridge*, —— U.S. ——, 77 LRRM 2501 (June 14, 1971). In addition, we also note that your response of July 23 does not deny that a regional office is required to follow a determination by the Advice Branch as to the disposition of a particualr matter and incorporate the rationale of such a determination in the formal notification sent to the parties. Indeed, the history of this particular case amply demonstrates that the foregoing is the practice and policy of the Board.

2. Contrary to your response of July 23, we do not believe that Advice or Appeals memoranda are privileged against disclosure under 5 U.S.C. § 552(b)(5). In contrast to *International Paper Co.* v. *Federal Power Commission*, 438 F.2d 1439 (2d Cir. 1971), such Advice and Appeals memoranda are clearly "legally germane", determinative rather than "only advisory in character," and are not merely "preliminary" in nature. We reiterate that we are not seeking either the Region's request for advice or any of the internal deliberations of the Advice Branch or the Region; we are seeking only the final determination of the Advice Branch which made mandatory the dismissal of the instant charge. Accordingly, what we request would not inhibit candid interagency discussions or delve in any manner into the mental processes of Board agents. Finally, it is our opinion that the information we have requested could be discovered under Rule 26(b) of the Federal Rules of Civil Procedure in a civil suit against the Board and would, therefore, "constitute memorandums or letters which would . . . be available by law to a party other than an agency in litigation with the agency", 5 U.S.C. § 552 (b)(5).

3. Similarly, we do not believe that Advice or Appeals memoranda are privileged against disclosure under 5 U.S.C. § 552(b)(7). Initially, the information we have requested is not "compiled for law enforcement purposes" since, by reason of the dismissal letter, no such enforcement is contemplated. Moreover, we again note that we are not requesting any of the investigatory files of the Board or its internal deliberations. We are only seeking the legal conclusion of the Advice Branch which

resulted in the Region's dismissal of this case. Accordingly, what we have requested cannot in any manner harm any court case the Board may hereafter file. In the absence of such "imminent" harm, exemption 7 does not permit a refusal to disclose information. See S.Rep. No. 813 on S. 1160 and *Bristol-Myers* v. *F.T.C.* 424 F. 2d 935 (1970).

4. While you make no assertion that the information we have requested is not identifiable, nor would any such assertion lie (see *Wellford* v. *Hardin*, 315 F.Supp. 175 (D.Md., 1970)), you do claim that some of the information requested is not maintained in the particular form sought. As to Advice memoranda and the digest or index of such determinations as requested in paragraphs 2 and 3, pp. 2 and 3 of our letter of July 14, your response indicates that such memoranda are "collected and filed according to the issues raised in each case . . . ." Therefore, since we believe for the reasons already stated that such memoranda are required to be disclosed under the Freedom of Information Act, our previous request is clarified to encompass, in addition to all Advice memoranda issued within the past five years involving issues similar to those in the instant case as described in our previous request, a listing of those issues for which separate files of memoranda are maintained by the Advice Branch. Your response states that "no subject index, compilation, or book of digests" is maintained for the appeal disposition letters sent to parties by the Office of Appeals. Since such determinations are, however, identifiable we believe that the fact "that to find the material would be a difficult or time-consuming task is of no importance" (*Wellford* v. *Hardin*, *supra*), particularly as we have offered to pay any costs involved. Alternatively, as to Appeals memoranda and the index or digest of such determinations as requested in paragraphs 2 and 3, at pages 2 and 3 of our July 14 letter, we offer to make available a representative of this office for the purpose of examining such memoranda in order to compile the information previously requested. Such representative, we request, should be provided access to all Appeals determinations within the past five years so

that he may ascertain those cases involving issues similar to those in the instant case.

Please advise the undersigned of the time and place the information described above will be made available for inspection and/or copying and inform us of the reasonable fees, if any, required to reimburse the Board for the costs incurred in connection with this request. Should you determine that any portion of this request will not be granted, we would request that, pursuant to Section 102.117(c) of the Board's Rules, we be sent prompt notice of such a determination accompanied by a written statement of the reasons therefor.

Since the information sought to be elicited herein is essential to the preparation of the appeal in the instant case, we have concurrently herewith requested the Office of Appeals to toll the time for filing said appeal pending your ruling on the requests herein made.

Very truly yours,

LEDERER, FOX AND GROVE

By /s/ Lawrence M. Cohen
LAWRENCE M. COHEN
Attorneys for Sears,
Roebuck and Co.
Charging Party

LMC:hy

cc Mr. Irving M. Herman
Director, Office of Appeals

Mr. Charles M. Henderson
Regional Director, Region 19

EXHIBIT "G"

[Logo]

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570 Aug. 4, 1971

Lawrence M. Cohen, Esquire
Lederer, Fox and Grove
Chicago Title and Trust Building
Chicago, Illinois 60602

Re: Retail Clerks Union, Local No. 4,
Retail Clerks International
Association, AFL-CIO
(Sears, Roebuck and Co.)
Case No. 19-CB-1673

Dear Mr. Cohen:

This letter is in response to your letters of July 28 and 29, 1971, to Mr. Herman and myself, respectively, and also confirms the August 2, 1971, telephone conversation between Mr. Miller of the Office of Appeals and you.

With regard to your letter of July 29, in which you renewed your requests for the material sought in your original letter of July 14, I must deny your requests, since your new letter does not present any substantial reasons for changing the views previously communicated in my earlier letter.

However, since there may be some misunderstanding on your part with respect to the issues you have raised, some additional comments are in order. Thus, I note that you characterize an Advice Branch memorandum as a "final determination" or a "legal conclusion". In this regard, I can only repeat what I said in my previous letter, i.e., that Advice Branch memoranda are merely guides for a Regional Director as to how a specific case is to be handled and such memoranda reflect the thought processes and legal analyses of the General Counsel's staff. Similarly, I note that you appear to be under the impression that a Regional Office is required "to incorporate the rationale of [an Advice Branch memo-

randum in the formal notification sent to the parties." In fact, a Regional Director prepares his own letter to the parties in virtually all cases in which he refuses to issue complaint, including cases previously sent to the Advice Branch. If there is an Advice Branch memorandum in a particular case, he uses that memorandum only as a guide in preparing his letter.

Your letter of July 29 also makes certain requests not previously made by you. With respect to your request for "a listing of those issues for which separate files of memoranda are maintained by the Advice Branch", such request is denied. In my previous letter, I explained to you my reasons for concluding that disclosure of Advice Branch memoranda is not required under the Freedom of Information Act (5 U.S.C. Sec. 552). Based on that conclusion, I informed you that such memoranda would not be disclosed to you, either individually or in the collected form in which they are used by the Advice Branch staff as a research tool. For these same reasons, I am denying the aforementioned new request.

I am also denying your request for access to all Appeals determinations within the past five years. Insofar as your request includes cases in which an appeal was sustained, such determinations are not "final opinions" and there is therefore no requirement that they be disclosed. With respect to cases in which an appeal was denied, the requested materials would include several thousand Appeals determinations. It is our view that since this material does not have "precedential significance", the disclosure of such material is governed by Subsection (3) of the Freedom of Information Act rather than Subsection (2). Subsection (3) requires that one requesting disclosure of agency records governed by that section must provide a reasonably specific description of the particular record sought. Since you have not specified or identified these determinations in any way, I believe there is no obligation on our part to honor such a blanket request. I may add that we do not maintain a separate collection of Appeals determinations in which an appeal is denied. Rather, all Appeals deter-

minations are collected chronologically, without regard to whether an appeal was sustained or denied. Accordingly, in order to meet a request for "final opinions", i.e., those in which an appeal was denied, it would be necessary to separate such cases from those in which the appeal was sustained in whole or in part. We could not permit your representative to separate these two types of cases since this would necessarily involve access to nondisclosable materials, i.e., Appeals determinations in which the appeal was sustained in the whole or in part. Nor do I consider it warranted in the circumstances to expend Agency time and effort for the performance of this task, even if the Agency were subsequently reimbursed for the expenses involved.

With respect to your letter of July 28 to Mr. Herman, I am denying your request for an extension of the time within which your appeal must be filed in the above-captioned case. Accordingly, such appeal must be received by the close of business, August 9, 1971.

Should you have any questions with respect to this letter, please do not hesitate to call upon me.

Very truly yours,

/s/ Eugene G. Goslee
EUGENE G. GOSLEE
Acting General Counsel

EXHIBIT "H"

[Logo]

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570 August 20, 1971

Re: Retail Clerks Union, Local No. 4,
Retail Clerks International
Association, AFL-CIO
(Sears, Roebuck and Company)
Case No. 19-CB-1673

Lawrence M. Cohen, Esq.
Lederer, Fox & Grove
Chicago Title and Trust Building
Chicago, Illinois 60602

Dear Mr. Cohen:

Your appeal in the above matter has been duly considered.

The appeal is sustained. The Union's refusal to bargain with the Company following the latter's withdrawal from a multiemployer association raised issues warranting Board determination. The investigation disclosed that Sears had withdrawn from the Employers Association prior to the first meeting between the Union and the Association. Although Article XVIII of the existing agreement between the Union and the Association contemplated a preliminary exchange of written proposals prior to the initial meeting of the parties, and the evidence showed that such proposals had been exchanged, Section E of that Article, which stated that "[n]egotiation, conciliation, arbitration or hearing on the issues . . . must be *commenced* [following] receipt of counternotice," [emphasis supplied], indicated that the parties had not intended to consider such preliminary exchange of proposals as constituting "actual bargaining negotiations" within the meaning of *Retail Associates, Inc.*, 120 NLRB 388, 395. See *Seattle Automotive Wholesalers Association*, 140 NLRB 1393. Sears' unequivocal withdrawal

from the Association prior to the first meeting was therefore deemed timely.

Accordingly, the case is remanded to the Regional Director with instructions to issue an appropriate 8(b)(3) complaint, absent settlement. All further inquiries should be addressed to the Regional Director.

Very truly yours,

EUGENE G. GOSLEE
Acting General Counsel

By /s/ Irving M. Herman
IRVING M. HERMAN
Director, Office of Appeals

cc: (See next page.)

CERTIFIED MAIL

Re: Case No. 19-CB-1673

cc: Director, Region 19

Retail Clerks Union Local No. 4, 125 W. Granite, Butte, Montana 59701
Sears, Roebuck & Co., 32 E. Granite St., Butte, Montana 59701
Retail Clerks Intl. Assn., 2819 First Ave., Seattle, Wash. 98121
Allan C. Raywid, Esq., 2011 I St., N.W., Wash., D.C.

EXHIBIT "I"

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 19

Case No. 19-CB-1673

RETAIL CLERKS UNION, LOCAL NO. 4, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

and

SEARS, ROEBUCK AND CO.

COMPLAINT AND NOTICE OF HEARING

It having been charged by Sears, Roebuck and Co. (herein called Sears) that Retail Clerks Union, Local No. 4, Retail Clerks International Association, AFL-CIO (herein called Respondent) has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act as amended, 29 U.S.C. Sec. 151 *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of said Board, by the undersigned Regional Director for Region 19, acting pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1. The charge herein was filed on April 9, 1971, and a copy thereof was served upon Respondent by registered mail on or about that same date.

2. a. Sears is a New York corporation engaged in the operation of retail department stores throughout the United States, including the state of Montana.

b. Sears' Butte, Montana Department Store is the only store involved in this proceeding.

c. During the past year, in the operation of its Butte, Montana store, Sears' gross volume of business exceeded $500,000 and it purchased directly from outside the state of Montana products valued in excess of $100,000.

3. Sears is, and has been at all times material herein, an Employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

5. a. Silver Bow Employer's Association (herein called the Association) is, and has been at all times material herein, an association of employers in and around Butte, Montana, established and existing for the purpose of, *inter alia*, representing employers in negotiations with labor organizations.

b. On August 15, 1968, the Association and Respondent executed a collective bargaining agreement covering certain employees of the members of the Association, then including Sears, Butte store. Said agreement had an effective date of May 1, 1968 and expired April 30, 1971.

6. a. On March 23, 1971, Sears, by telegram, notified Respondent and the Association that it was resigning from, and withdrawing as an employer member of, the Association.

b. Sears notification of withdrawal from the Association was communicated to both the Association and Respondent prior to the commencement of negotiations for a new collective bargaining agreement between Respondent and the Association.

7. The following employees of Sears' Butte store constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Department heads, salespeople, window trimmers, mail order department employees, floor walkers, milliners, cashiers, bundle wrappers, collectors, advertising writers, alteration department employees, shipping and receiving clerks, stock clerks, checkers,

and all persons who are actively engaged in handling or selling merchandise, including both journeymen and apprentice grades, exclusive, however of: persons regularly employed eight (8) hours or less per week, errand boys, office employees, janitors, salesmen who spend more than sixty (60%) per cent of the time outside of the city, and outside salesmen soliciting on a commission basis, and further, exclusive of supervisory employees within the meaning of the National Labor Relations Act, as amended.

8. Respondent is the only recognized exclusive collective bargaining representative of the employees in the Sears' Butte store unit described above in paragraph 7, within the meaning of Section 9(a) of the Act.

9. Since on or about March 23, 1971, Respondent has refused to bargain separately with Sears in the bargaining unit described above in paragraph 7 with respect to terms and conditions of employment, and has insisted that Sears is bound by any agreement reached by and between Respondent and the Association, notwithstanding the fact that Sears effectuated a timely withdrawal from the Association as set forth in paragraph 6 above.

10. By its acts and conduct described above in paragraph 9 and by each of said acts, Respondent did refuse, and is refusing, to bargain collectively with Sears and thereby did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(b)(3) of the Act.

11. The acts of Respondent described in paragraph 9 above, occurring in connection with the operations of Sears as described above in paragraph 2, have a close, intimate, and substantial relation to trade, traffic and commerce among the several states of the United States, and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce, and constitute unfair labor practices affecting commerce within the meaning of Section 8(b)(3) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 9th day of November 1971, at 10:00 a.m. in the Grand Jury Room,

314, Federal Building, Butte, Montana, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board, is attached.

YOU ARE FURTHER NOTIFIED that pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Respondent shall file with the Regional Director for Region 19 an original and four copies of an answer to said Complaint within ten (10) days from the service thereof and that should Respondent fail to so do, all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

Pursuant to Section 102.22 of the Board's Rules and Regulations, upon my own motion, I am extending the time in which to file answer to October 1, 1971.

Dated this 1st day of September 1971, at Seattle, Washington.

CHARLES M. HENDERSON

Charles M. Henderson, Regional Director
National Labor Relations Board, Region 19
1511 Third Avenue, 1000 Republic Building
Seattle, Washington 98101

[Caption omitted in Printing]

DEFENDANTS' ANSWER TO AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

The General Counsel of the National Labor Relations Board hereby answers the amended complaint as follows:

(1) Admits that this action arises under 5 U.S.C. Sec. 552;

(2) Admits that this Court has jurisdiction over this action under 5 U.S.C. Sec. 552;

(3) Avers that this action is not appropriately a class action under Rule 23(b)(2) since the questions of law and fact are not common to the class sought to be represented:

(4) Admits the allegations of paragraph 4;

(5) Admits the factual allegations of paragraph 5, but denies that the National Labor Relations Board is appropriately a defendant in this suit;

(6) Admits the allegations of paragraph 6;

(7) Admits the factual allegations of paragraph 7, namely, that Arnold Ordman was General Counsel of the National Labor Relations Board from 1963 to and including June 25, 1971, and that Peter G. Nash is and has been General Counsel at all times since August 24, 1971, but denies that the practice of Nash with respect to the disclosure of any agency records which may be involved in the instant complaint is the same as that of Goslee;

(8) Admits the factual allegations of paragraph 8 with respect to the function of the Regional Advice Branch as set forth in 32 F.R. 9588, Section 202.1.1 and admits that the Regional Advice Branch issues memoranda to the Regional Directors, but denies that it issues mandatory instructions with respect to the final disposition of charges filed with the General Counsel or the issuance of unfair labor practice complaints;

(9) Admits the allegations of paragraph 9 with respect to the duties of the Office of Appeals as set forth in Section 102.19 of the Board's Rules and Regulations

and Section 202.1.2 of 32 F.R. 9588, but denies that the Office of Appeals determinations are always communicated to the Regional Director by means of a memorandum;

(10) Admits the allegations of paragraph 10 to the effect that it has been the past practice of the Office of General Counsel to refuse to make the requested information available on the grounds that it is privileged from disclosure under the Freedom of Information Act, but denies all other allegations of paragraph 10;

(11) Admits the factual allegations of paragraph 11, but denies that the Regional Director for the Nineteenth Region acted pursuant to mandatory instructions from the Advice Branch in dismissing the complaint;

(12) Admits the allegations of paragraph 12;

(13) Admits the allegations of paragraph 13;

(14) Admits the allegations of paragraph 14;

(15) Denies that the General Counsel is depriving plaintiff, or the class it seeks to represent, of information to which there is a right of access under the Freedom of Information Act;

(16) Admits that this Court has jurisdiction to determine whether the plaintiffs have a right to the requested information under the Freedom of Information Act, but denies that a class action appropriately lies and denies that a claim has been made out on which a declaratory judgment can appropriately be entered by this Court;

(17) Denies all other allegations of the complaint not herein specifically admitted.

Further answering, the General Counsel states the following:

(1) The amended complaint should be dismissed as to the defendant, National Labor Relations Board, since it is not appropriately a party defendant. Section 3(d) of the National Labor Relations Act delegates to the General Counsel final, unreviewable authority over the investigation of charges and the issuance of complaints and all the requested information relates solely to the performance of that duty by the General Counsel;

(2) The amended complaint should also be dismissed as to defendant Goslee. The amended complaint was filed on October 14, 1971, Goslee was not the Acting General Counsel at that time, and has not been since August 24, 1971;

(3) Peter G. Nash was at the time of the filing of the amended complaint and still is, the General Counsel of the National Labor Relations Board. Since the action is against Goslee in his capacity as General Counsel, Peter G. Nash should be substituted for Goslee as defendant;

(4) The General Counsel has stated to counsel for plaintiff Sears by letter of this date that he will make available the Advice memoranda for the past 5 years in cases similar to those involved in plaintiff Sears' case (Board Case No. 19-CB-1973), as defined with more particularity in Sears' request for information (Ex. B to the Amended Complaint). Deleted from the memoranda will be all identification of witnesses, confidential sources of information and other matters of "security sensitive" nature. Memoranda in current cases will be made available when litigation of the case at the agency level has been completed (See, Exhibit 1, attached hereto);

(5) The General Counsel has concluded that the letters sent to parties by the Office of Appeals are public information which will be made available for inspection and copying. He has offered to make available to plaintiff all such letters for the past 5 years in cases involving similar issues as described in paragraph (4) above. In addition, the General Counsel has offered to make available memoranda which the Office of Appeals prepares in some of these cases and sends to the regional directors, again subject to completion of litigation of these cases before the agency (See, Exhibit 1, attached hereto);

(6) The General Counsel has also offered to make available to plaintiff the index of Advice memoranda maintained for internal use. (See, Exhibit 1, attached hereto);

(7) The Office of Appeals has not heretofore maintained a subject index which would allow quick retrieval of information, in the form presently described by plain-

tiff. Nevertheless, the General Counsel has offered to search the chronological files and make the requested Appeals' materials available. However, since it is estimated that the cost of such a search will be substantial, the General Counsel has offered to meet with plaintiff Sears to discuss whether the information requested may be furnished at a lesser cost in time and money than that presently anticipated by the Office of Appeals;

(8) No injunction should be entered since the General Counsel is withholding no information from plaintiff which is not privileged from disclosure by 5 U.S.C. Sec. 552.

WHEREFORE, defendants demand judgment that the complaint herein be dismissed.

Dated at Washington, D.C. this 3rd day of February 1972.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

By /s/ Glen M. Bendixsen
GLEN M. BENDIXSEN
CHIEF OF SPECIAL LITIGATION
Washington, D.C. 20570
Telephone: (202) 382-5401

Co-counsel: CHARLES N. STEELE
(Ext. 6164)
JANET MORRIS
(Ext. 4087)

Attorneys for Defendant

EXHIBIT 1

[Logo]

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570 February 3, 1972

Lederer, Fox and Grove
Att'n: Lawrence M. Cohen
Chicago Title and Trust Building
111 West Washington Street
Chicago, Ilinois 60602

Re: *Sears, Roebuck and Co.* v. *National Labor Relations Board*
Civil Action No. 1571-71 (D.C.D.C.)
Board Case No. 19-CB-1673

Dear Mr. Cohen:

I have decided to make available for inspection and copying all memoranda from the Regional Advice Branch to the Regional Directors for the past five (5) years in cases which, like Board Case No. 19-CB-1673, involve the issue of the timeliness of a withdrawal from multi-employer bargaining. We will delete from these memoranda all identification of witnesses, confidential sources of information and matters of "security sensitive nature." Moreover, I will not make these memoranda available until litigation of the case before the agency has been completed. Thus, in cases where the Regional Office dismisses the complaint, the Advice memoranda will not be made available until the time for an appeal to the Office of Appeals has run or an appeal has been denied pursuant to Sec. 102.19 of the Board's Rules and Regulations, 29 C.F.R. 102.19. In cases where a complaint issues (including complaint after sustaining an appeal) the Advice memoranda will not be made available until after the Board's Decision and Order has issued, which shall include the normal time for filing a motion for reconsideration pursuant to Section 102.48(d) of the Board's Rules and Regulations, 29 C.F.R. Sec. 102.48(d).

In cases which are settled at any stage of the proceeding (including formal and informal settlements, as well as out-of-Board adjustments), the Advice memoranda will be made available only after the parties have complied with the terms of the settlement agreement.

I am also making available the Advice Branch index in its present form. However, we wish to caution you that the index was prepared and has been maintained solely for the guidance of agency personnel in their research of cases submitted, and may incompletely identify cases on the subject matter in question. The memoranda and index will be made available to you for inspection and copying at a date mutually convenient to you and Mr. Gerald Brissman, Assistant General Counsel in charge of the Advice Branch. Or, if you prefer, we will send you xerox copies of the relevant memoranda and index and charge you for the cost of copying.

Letters sent to the parties by the Office of Appeals are public information, and will, accordingly, be made available for your inspection and copying. I will also make available the memoranda sent by the Office of Appeals to the regional directors analyzing appeals cases. Such memoranda are not, however, prepared in all cases. Here again, as with Advice memoranda, release will be authorized only after litigation of the case before the agency is complete. That is, memoranda sent to Regional Directors authorizing dismissal of a complaint will be immediately available; those authorizing issuance of a complaint will become available after compliance with a settlement agreement or after the Board's Decision and Order has issued and the time for filing a motion for reconsideration has run.

The Office of Appeals, however, has never maintained a subject matter index of either the letters or the memoranda, indexing them instead by their Board Case number and in a chronological file. Accordingly, retrieving these materials will require considerable time and effort, since it will require that agency personnel go through the chronological files, read the memoranda to identify those pertaining to your request and delete any matters which identify witnesses, or reveal confidential sources

of information on matters of a "security sensitive nature." Thus, though these materials can be located, Irving Herman, Director of the Office of Appeals, estimates that, once agency personnel can be assigned to the task, it will take roughly three man weeks to separate them out from the approximately 7000 to 8000 cases involved, at a cost that may run as high as $3000. In view of the high costs involved, I or one of my representatives would be glad to meet with you to explore whether your request could be satisfied with less expenditure of time and money.

Finally, I would like to call your attention to the fact that, while I am agreeing to make the above documents available I do not consider that this agency is bound in all instances to do so and, further, I consider them neither binding authority nor even authoritative precedent for decisions made in either current or future cases.

Very truly yours,

/s/ Peter G. Nash
PETER G. NASH
General Counsel

[Caption omitted in Printing]

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

1. This Court has jurisdiction over this action under 5 U.S.C. § 552.

2. Sears, Roebuck and Co. (hereafter "Sears") is a domestic corporation organized and existing under and by virtue of the laws of the State of New York.

3. Defendant National Labor Relations Board is an independent Federal Agency created and existing under the Labor Act, 29 U.S.C. 141, *et seq.*, with its principal offices in Washington, D.C.

4. Defendant Eugene G. Goslee (hereafter "Goslee") was, during the period from June 25, 1971 to and including August 24, 1971, the Acting General Counsel, and Arnold Ordman and Peter G. Nash (hereafter "Ordman" and "Nash") were during the periods from 1963 to and including June 25, 1971, and from August 24, 1971 to date, respectively, the General Counsel of the National Labor Relations Board, an office created by and existing under Section 3(d) of the National Labor Relations Act (hereafter the "Act"), with principal offices in Washington, D.C., and as such were empowered, on the Board's behalf, to issue or refrain from issuing unfair labor practice complaints under Section 10 of the Act (a power which has been delegated to the Board's Regional Directors, see Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, 29 C.F.R. 102.15) and, pursuant to Section 102.117(c) of the Board's Rules and Regulations, Series 8, as amended, 29 C.F.R. 102.117(c), to receive and answer requests for certain agency records.

5. On or about April 9, 1971, Sears filed an unfair labor practice charge with the Regional Director of the Nineteenth Region of the National Labor Relations Board (hereafter the "Regional Director") against Retail Clerks Union No. 4, Retails Clerks International Association, AFL-CIO (hereafter the "Union"), entitled Case No. 19-CB-1673, alleging that by various acts and conduct the Union had violated and is violating Section

8(b)(3) of the Act, and seeking issuance of a complaint by the Regional Director, acting for and on behalf of the Board's General Counsel, against the Union.

6. On or about April 27, 1971, the Regional Director referred said charge to the Advice Branch of the Office of the General Counsel in Washington, D.C. The Advice Branch has responsibility, under the supervision of the Board's General Counsel, to review requests by the Board's Regional Directors for advice and to formulate policy on novel or unsettled procedural and substantive matters arising in unfair labor practice cases. Section 201.11 of the Board's Statements of Procedure, Series 8, as amended. 32 C.F.R. 9588. In this capacity, the Advice Branch issues instructions to said Regional Directors with respect to final disposition of unfair labor practice charges and the issuance of unfair labor practice complaints. Said instructions, along with the precedents, theories and analyses in support thereof and occasional references to relevant prior Advice determinations, are communicated to the Regional Directors by means of a memorandum (hereafter "Advice Memorandum"). Exhibits 10, 11 and 12 attached to and made a part hereof, as described hereafter, are representative examples of said Advice Memorandum.

7. On or about June 10, 1971, after receipt of an Advice Memorandum from the Advice Branch, the Regional Director informed Sears that he was refusing to issue a complaint with respect to the charges filed by Sears in Case No. 19-CB-1673. He further notified Sears that said determination would be final unless timely review thereof was sought before the Office of Appeals of the Office of the General Counsel in Washington, D.C. pursuant to the applicable rules and regulations of the Board. A true and correct copy of said letter is attached to and made a part of the Amended Complaint as Exhibit "A".

8. The Office of Appeals has responsibility to review appeals from the refusal of a regional director to issue an unfair labor practice complaint and, under the supervision of the Board's General Counsel, to sustain or reverse said refusal. Section 202.1.2 of the Board's State-

ments of Procedure, Series 8, as amended, 32 C.F.R. 9588; Section 102.19 of the Board's Rules and Regulations, Series 8, as amended, 29 C.F.R. 102.19. Said determination of the Office of Appeals, along with the precedents, theories and analyses in support thereof and occasional references to relevant prior Appeals determinations, are ordinarily communicated to the Regional Directors by means of a memorandum (hereafter "Appeals Memorandum"). Exhibits 3, 4, 5, 6, 7, 8 and 9 attached to and made a part hereof, as described hereafter, are representative examples of said Appeals Memorandum.

9. On or about July 14, 1971, Sears, acting under the Freedom of Information Act and in compliance with the applicable Board rules, filed a request for information (hereinafter "request") with the Board through Goslee. In this request, Sears requested that Goslee, in accordance with the Freedom of Information Act, make available for public inspection and/or copying, the Advice Memoranda in Case No. 19-CB-1673 as well as other relevant Advice and Appeals memoranda, and the indices thereof, as more fully described in the request, a true and correct copy of which is attached and made a part of the Amended Complaint as Exhibit "B".

10. As of July 14, 1971, and continuing to February 3, 1972 as hereafter described, it was the practice of the Office of the General Counsel to refuse to make available to the Public Advice and Appeals Memoranda, and indices thereof, on the grounds that such information is privileged from disclosure under the Freedom of Information Act.

11. On or about July 22, 1971, Goslee, pursuant to the practice described in paragraph (10), by teletype to Sears, and confirmed by a letter of explanation dated the next day, refused to make available to Sears any of the information sought in its request of July 14, 1971 and advised Sears that the Regional Director would inform Sears "shortly . . . . [and] with greater particularity" the reasons for his refusal to issue complaint. True and correct copies of the teletype and letter are

attached to and made a part of the Amended Complaint as Exhibits "C" and "D", respectively.

12. On or about July 28, 1971, acknowledging that he was acting pursuant to the direction of Goslee as set forth in Goslee's teletype of July 22, 1971, the Regional Director, again acting in accord with the aforesaid instructions of the Advice Branch, informed Sears "with greater particularity" the reasons for refusing to issue complaint and set forth additional reasons for that decision. A true and correct copy of said letter is attached to and made a part of the Amended Complaint as Exhibit "E".

13. On or about July 29, 1971, Sears filed a renewed request for information (hereinafter "renewed request") with Goslee in which Sears repeated its request for such information under the Freedom of Information Act, as more fully described in the true and correct copy of the renewed request attached to and made a part of the Amended Complaint as Exhibit "F".

14. On or about August 4, 1971, Goslee, pursuant to the practice described in paragraph 10 above, by letter to Sears, refused to make available to Sears any of the information sought in the renewed request. A true and correct copy of said letter is attached to and made a part of the Amended Complaint as Exhibit "G". In order to comply with the applicable time requirements and expressly reserving its rights involved herein, Sears under protest then timely filed its appeal in Case No. 19-CB-1673 with the Office of Appeals.

15. On or about August 20, 1971, the Office of Appeals advised Sears that its appeal had been sustained, and that the matter had been remanded to the Regional Director with instructions to issue an appropriate complaint on its behalf. A true and correct copy of said letter is attached to and made a part of the Amended Complaint as Exhibit "H". Pursuant to said instructions, the Regional Director did thereafter issue for and on behalf of the General Counsel a complaint, a true and correct copy of which is attached to and made a part of the Amended Complaint as Exhibit "I".

16. The information Sears sought in its request and renewed request has not been made available to Sears except to the extent that it has been provided as described in a letter from Nash to Sears dated February 3, 1972. In said letter, a true and correct copy of which is attached to and made a part of the Answer as Exhibit 1, Nash admits that the letters sent to parties by the Office of Appeals are public information which will be made available for inspection and copying. In addition, Nash also agrees to make available to Sears Advice and Appeals Memoranda, and the index of Advice Memoranda maintained for internal use, although continuing to assert, as had been the policy of Ordman and Goslee, that such documents are privileged from disclosure under the Freedom of Information Act. To be deleted from such Memoranda are all identification of witnesses, confidential sources of information and other matters of "security sensitive" nature as defined by the General Counsel; and memoranda in current cases, including that in Case No. 19-CB-1673, are to be made available to Sears only when litigation of the case before the Board has been completed. Nash further advises Sears that there is no index of Appeals Memoranda presently available; the chronological files of such memoranda, however, will be made available to Sears to retrieve the information requested, as hereafter described.

17. The Committee on Practice and Procedure of the American Bar Association's Section of Labor Relations Law (hereafter the "ABA"), has repeatedly requested that the General Counsel of the Board make available to the public, under the Freedom of Information Act, Advice and Appeals Memoranda and indices thereof. See the 1970 Report of the Committee, pp. 5-10, and 1971 Report of the Committee, pp. 233-7 and 242-6, true and correct copies of which are attached to and made a part hereof as Exhibits 1 and 2.

18. At a meeting of the Committee on January 27, 1972, representatives of the General Counsel disclosed that Nash, pursuant to a renewal of the requests set forth in the preceding subparagraph, had decided to make available to the public Advice and Appeals Memo-

randa, subject to certain limitations to be discussed with the Committee, and would prepare an index thereof. Following the disclosure of this policy change, on or about February 3, 1972, Sears wrote to Nash. A true and correct copy of said letter is attached to and made a part of the Smetana affidavit as Exhibit "M" thereto. This letter was supplemented, following meetings between Sears' representatives and Nash and other representatives of the General Counsel at which the Sears' representatives again stressed such relevancy by letters from Sears to Board Associate General Counsel Irving and Nash dated February 4 and 8, 1972, respectively. True and correct copies of these letters are attached to and made a part of the Smetana affidavit as Exhibit "O" and "P" thereto.

19. By letter of February 8, 1972, Nash submitted to Sears certain Advice Memoranda, an index to Advice Memoranda, advised that other Advice Memoranda would be supplied "as soon as possible", and further advised that, as there was no index of Appeals Memoranda, procedures for their inspection would have to be "worked out". A true and correct copy of this letter is attached to and made a part of the Smetana affidavit as Exhibit "Q" thereto.

20. By letter dated February 9, 1972, Sears advised Nash that Sears would make its own personnel available to assist in retrieving the approximately 7,000 to 8,000 Appeals Memoranda which Nash had indicated would be available to Sears. In said letter, Sears also objected that it had not received identical copies of the Advice Memoranda requested but, instead, a sanitized version thereof which, in its opinion, was contrary to the requirements of the Freedom of Information Act. A true and correct copy of said letter is attached to and made a part of the Smetana affidavit as Exhibit "R" thereto.

21. Commencing on February 16, 1972, and virtually continuously thereafter to date, representatives of Sears have worked at the offices of the Board in Washington, D.C. to review the Appeals and Advice Memoranda that have been made available. The representatives of Sears have worked in accord with the instructions of the rep-

resentatives of the General Counsel, to wit: (1) the decisions have been examined without disturbing their original order; (2) no written notes have been made on any substantive matters; (3) unessential conversations with Board personnel have been avoided. In the course of the investigation, for the first time, Sears representatives observed that a significant number of the Appeals Memoranda inspected and deemed pertinent to the issues presented in 19-CB-1673 were incomplete in that they relied upon the "circumstances of the case" without delineating those circumstances. Exhibits 3, 4 and 5 attached to and made a part hereof are true and correct copies of Appeals Memoranda that were made available to Sears and are representative of such cases. In addition, other Appeals memoranda inspected were incomplete in that they incorporated by reference and relied upon provisions in various extraneous documents without describing or attaching to the memoranda such other documents. Exhibits 6, 7 and 8 attached to and made a part hereof are true and correct copies of Appeals Memoranda that were made available to Sears and are representative of such cases. Exhibit 9 attached to and made a part hereof is a true and correct copy of an Appeals Memoranda that was made available to Sears and is the sole example, in all the Appeals Memoranda investigated, of any contrary practice. Exhibits 10, 11 and 12 attached to and made a part hereof are true and correct copies of Advice Memoranda that have been made available to Sears.

22. As a result of observations described in the preceding paragraph, by letter dated March 1, 1972, Sears requested Nash make available to Sears, under the Freedom of Information Act, the "underlying data and/or documentation" necessary to intelligently assess those memoranda which it had been discovered were pertinent to Case No. 19-CB-1673 and which referred to such data and documentation. The nature of such data and documentation, e.g., collective bargaining agreements or similar documents upon which the pertinent memoranda relied and copies of the underlying regional directors' decisions from which the appeals had been taken, was

also set forth in said letter. A true and correct copy of said letter to Nash is attached to and made a part hereof as Exhibit 13. By letters dated March 14 and April 11, 1972, true and correct copies of which are attached hereto and made a part hereof as Exhibits 14 and 15, Sears clarified its request that various Advice memoranda and Appeals letters and memoranda be made available.

23. By letter dated March 7, 1972, Nash advised Sears that he was denying Sears' request for the additional information sought in its letter of March 1, 1972. Nash further noted that various matters had been deleted from the Appeals memoranda which had been made available. A true and correct copy of this letter is attached hereto and made a part hereof as Exhibit 16.

24. The hearing in Case No. 19-CB-1673 has been continued to date and, following issuance of this Court's preliminary injunction enjoining the Board from proceeding in Case No. 19-CB-1673 until Sears has had a reasonable time to (i) inspect and analyze that information which has been made available; (ii) resolve the still unresolved dispute as to the remainder of the information sought; and (iii) inspect and analyze such additional information if it is made available, the Regional Director postponed indefinitely the hearing in Case No. 19-CB-1673.

25. By letter dated May 17, 1972, Sears advised Nash of the current status of its investigation and analysis of the Advice and Appeals memoranda received. In said letter, Sears again objected that it had not received the underlying documentation requested and to the deletion of various information from said memoranda. Additionally, Sears specified the reasons relied upon to support such objections. A true and correct copy of said letter is attached to and made a part hereof as Exhibit 17.

Dated at Washington, D.C. this 22nd day of May 1972.

GERARD C. SMETANA
925 South Homan Avenue
Chicago, Illinois 60607

ALAN RAYWID
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D.C.

LAWRENCE M. COHEN
LEDERER, FOX & GROVE
111 West Washington Street
Chicago, Illinois 60602

Attorneys for Plaintiff

Of Counsel:

COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D.C.

LERDERER, FOX & GROVE
111 West Washington Street
Chicago, Illinois 60602

EXHIBIT 1

PROCEDURE UNDER THE NATIONAL LABOR RELATIONS ACT (1970)

4. BOARD DECISIONS

At the present time the Board is two years behind in publishing its decisions in bound volumes. The Board's Liaison Committee expressed deep concern over the problem of delay and observed that the inconvenience experienced by the Labor Bar was shared by the Board personnel as well. The Liaison Committee indicated that a basis for long-term improvement, however, has been developed. The Government Printing Office has begun the publication of Board decisions by an electronic photocomposition method which should reduce the publication time to approximately three to five months following issuance of the Board's slip decisions.

Implicit, however, in coping with the problem of delay has been the fact that the costs of printing and publication must be borne by the Board out of its general budget. In view of the fact that a ceiling has been placed on the number of employees which the Agency may retain, and with an increase in case-load and a decrease in the budget, the first employees to be released are the non-case handling personnel. Thus, the alleviation of this aspect of the problem of delay is directly tied to budgetary considerations and the availability of funds to arrange for employment and allocation of necessary personnel to engage in editing, proofreading, copy work, etc. The Board indicated that even with the necessary funds, it would take about two years to eliminate the publication backlog. In the interim there is hope that some measurable and steady reduction of delays in publication can be made notwithstanding increasing costs and budgetary limitations.

5. WEEKLY SUMMARY (Rules and Regulations)

The Board's Division of Information prepares a *Weekly Summary* of cases which is available to *anyone* upon request. At your Committee's suggestion, the Board's Liaison Committee agreed to give serious consideration to publication of changes of Rules and Regulations in the *Weekly Summary*, thereby giving practitioners the text of such changes earlier than they would otherwise be made available through the services of the Government Printing Office.

The foregoing discussion dealt with areas and materials which the Board has prepared, updated and made available to the public in keeping with the spirit of the Freedom of Information Act. The following discussion deals with areas where to date the Board has not made available information required by the Act.

A. *Index of Unpublished Material*—Your Committee has repeatedly sought to persuade the Board to make available an index of unpublished material. The Board has steadfastly asserted that it is not feasible to prepare a "meaningful" index, either because the material would be so general as to be of minimal value or, if made specific, would thereby disclose the substance of the material which, in the Board's view, would violate *its obligation of non-disclosure*. The Board also feared that publication of such an index would encourage litigation and would place the Board in the forefront of an area where, in the Board's view, other agencies of government have been disinclined to enter. The Board also noted that any work which would be involved in the consideration or preparation of an index or other materials sought under the Freedom of Information Act would have to be evaluated in the light of the reduction in the Board's 1971 budget which would necessarily reflect itself in the reductions of staff personnel. The Board stressed that with a projected 5% increase in case load, coupled with the lower budget, in the absence of some specific appropriation or special earmarking of funds to deal with Freedom of Information Act responsibilities, it would continue to place primary emphasis in staff as-

signments to personnel engaged in the processing and handling of cases.

Your Committee continues to adhere to its previous position that the Freedom of Information Act imposes an affirmative obligation for disclosure and that even in the absence of any such obligation, the Board should provide for public access to all materials which would not interfere with, or otherwise prejudice the operations of the agency. While your Committee appreciates and recognizes the practical problems which budgetary limitations have posed for the Board, the Freedom of Information Act, like the NLRA itself, is federal law and Congress has directed the Board to comply with its provisions.[1] While the Board may be required to make some accommodations and adjustments in order to discharge its varied responsibilities, pending Congressional relief through further appropriations, your Committee believes the Board should immediately undertake the preparation of an index of unpublished material.

B. *Advice and Appeals*—Your Committee also requested the Board to prepare an index of all determinations rendered by the General Counsel on cases submitted to the Advice Branch and the Office of Appeals, and that the Board make available, upon request, copies of *Advice and Appeal Memoranda.* Since the Committee's request for an Advice and Appeals Index and copies of such agency determinations was raised for the first time this past year, a more detailed discussion would appear warranted.

First, it should be clearly recognized that what your Committee is seeking are copies of all Memoranda or other documents reflecting decisions, recommendations, interpretations or policies formulated by the Advice Branch and by the Office of Appeals. Where the Advice Branch

[1] The NLRB has been admonished not "to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." *Southern Steamship Co.* v. *N.L.R.B.*, 336 U.S. 31, 47.

directs the Regional Director to issue a complaint, or where a Regional Director's dismissal is reversed on appeal and a complaint is subsequently issued, the subject matter, theory, and interpretation will ultimately be ventilated through the course of hearing, Trial Examiner and Board decisions, and perhaps review and adjudication in the courts. It is in all the remaining cases, however, where the General Counsel either through the Advice Branch or through the Office of Appeals determines that issuance of complaint *is not warranted*, and that such determination constitutes final agency action of precedential import. As Professor Davis stated in his book, *Discretionary Justice* (p. 206):

> " . . . Since many problems get no further in the Board's machinery than the Office of Appeals, opinions of that Office are the only available precedents on some questions. They are indexed and freely used within the office, along with similar opinions given by the Advice Branch of the General Counsel's Office in response to requests from Regional Officers for guidance on questions of law and policy. From the Advice and Appeals Opinions, the General Counsel's Office compiled a 'Book of Digests' for the guidance of the staff on issues about which the General Counsel's decisions constitute the only relevant law . . . ."

Your Committee believes that these "precedents" constitute precisely the kinds of "final opinions, statements of policy and interpretations," and "instructions to staff that affect a member of the public," which the Freedom of Information Act contemplates should be indexed and made available to the public, 5 U.S.C. § 552(a)(2)(A), (B), and (C).[2]

---

[2] Cf. Internal memoranda prepared by the General Services Administration which, on their face, are similar to memorandum prepared by the Office of Appeals and which the 9th Circuit determined to be within the disclosure requirements of § 552(a)(2)(B), *Benson* v. *GSA*, 289 F.Supp. 590, 591 (N.D. Wash. 1968), 415 F.2d 878, 881 (9th Cir. 1969). Compare also the "no action" letters prepared by staff personnel of the Security and Exchange Commission which, as is true of the Advice and Appeals memoranda, indicate

There should not be any need to extensively elaborate on the point that a determination by the General Counsel *not to litigate* not only constitutes the kind of "final agency action" which affects members of the public, but that members of the public have an abiding need to review such determinations to ascertain what "policies" and "law" the Office of the General Counsel is pursuing.[3] Moreover, since the policy of the Information Act is to provide ready access for members of the public to the law and policy of agencies that affect them, the public is entitled to know whether the Advice Branch or Office of Appeals has ever decided that certain issues are not deemed actionable by references to the underlying facts and the rationale which suppo the conclusion reached.

Presently, the public has f access to the published Board and Trial Examiners' Decisions from which insight as to the applicable law and developing policy may be gleaned from the reported facts, conclusions and determinations. And with respect to reported decisions, the Board (and other publication services) provides an index (and digest) so that the public may seek out those issues and precedents which affect them. In the same vein the public requires, and is entitled to receive, more

---

that on the basis of submitted facts and applicable law and rationale, "no [legal] action" will be taken. The Administrative Law Conference of the United States, during June 1970, "overwhelmingly approved a recommendation that the [SEC] publish 'no action' letters issued by the SEC or its staff." 38 L.W. 2657, 2658.

[3] It should be noted that the materials which your Committee seeks are predicated upon the general rights extended "any person" under § 552(a)(3) of the Freedom of Information Act and, as has been judicially determined, any member of the public seeking such information need not demonstrate any particularized "need" or that such person is involved in a proceeding before the agency. See *Tuchinsky* v. *Selective Service System*, 294 F.Supp. 803 (N.D. Ill. 1969), *aff'd* 418 F.2d 155 (7th Cir. 1969); *Bristol Myers* v. *FTC*, (D.D.C. 1968), reversed on appeal —— F.2d ——, (D.C Cir. 22,277, March 26, 1970), slp. op.; Davis 765. Further, as the D.C. Court of Appeals recently stated in *Ackerly* v. *Ley*, —— F.2d —— (D.C. Cir. 22 365, Dec. 19, 1969) Slip op.: ". . . And the fact that appellant might, presumably by a combination of intuition and diligent research, ferret out some of the materials relied upon is surely no reason to suppose that Congress made revelation under the Freedom of Information Act contingent upon a showing of exhaustion of one's own ingenuity." *Id.* at 10.

than a copy of the Advice Branch or Office of Appeals' sterile form letter which, in conclusionary terms, merely states that litigation is not deemed warranted. What the public requires is access to any document embodying the operative facts and underlying rationale which constitutes the basis for the General Counsel's final determination not to proceed. Your Committee believes a digest of such opinions should be published in order for the public to be in a position to make a "request for identifiable [Advice and Appeals] records," (§ 552(a)(3)) and that the Board must develop an index which will realistically permit the public to meaningfully formulate its requests and identify the materials sought.[4]

Your Committee believes its position is strengthened by the recent decisions of courts of appeals in dealing with questions arising under the Freedom of Information Act. A review of the litigation generally discloses that while the District Courts have been inclined to accept government arguments against disclosure, the courts of appeals have, contrary thereto, given broad reading to the affirmative provisions of the Act, counseling for disclosure and requiring the agency asserting a privilege to convincingly demonstrate that a particular document falls within one of the statutory exemptions.[5] Thus, your Committee does not believe that the Board is on solid ground when it asserts, without explication, that *Advice and Appeals Memoranda* are privileged under the "intra-agency" memorandum exemption appearing in § 552(b)(5) of the Freedom of Information Act. For example, in *American Mail Line Ltd.* v. *Gulick*, 411 F.2d 696 (D.C. Cir. 1969), the Maritime Subsidy Board an-

---

[4] On January 31, 1970, the Department of Labor amended its regulations dealing with its responsibilities under the Freedom of Information Act, *inter alia*, by providing for the particularized delegation of authority to agency personnel to prepare and promulgate indices. LRX 3003, pt. 70, and Section 70.5 in particular.

[5] *Bristol Myers Co.* v. *F.T.C.*, —— F.2d —— (D.C. Cir. 22,277, March 26, 1970) slip. op.: *Ackerly* v. *Ley*, —— F.2d —— (D.C. Cir. 22,665, December 19, 1969) slip. op.: *General Services Administration* v. *Benson*, 415 F.2d 878 (9th Cir. 1969); *Grumman Aircraft Engineering Corp.* v. *The Renegotiation Board*, —— F.2d —— (D.C. Cir. 22,277, March 26, 1970) slip. op.; *Consumers Union* v. *Veterans Administration*, 301 F.Supp. 796 (S.D. N.Y. 1969).

nounced that it was ordering three million dollars worth of subsidy refunds on the basis of an *agency memorandum* supporting a finding that the ships were carrying unnecessaily large crews. When the order was issued, the Board attached the last five pages of the Memorandum but refused to comply with the plaintiff's request for the production of the balance of the Memorandum on the ground that, under the "intra-agency memorandum" exemptions expressed in § 552(b)(5) of the Act, the withheld portions were privileged. The Court of Appeals, in rejecting the government's contention, noted that the Memorandum served as the basis for the Board's final determination and order, and therefore held that the entire Memorandum was a public record and that the Freedom of Information Act required the Subsidy Board to disclose the full and rationalized basis for that Agency's action *in its entirety*. Your Committee believes that a parity of reasoning would require no less from the NLRB in dealing with the instant subject.

Your Committee recognizes that compliance with its request will necessarily occasion additional "administrative" work for the NLRB. Approximately 1,400 appeals are handled by the General Counsel's Office of Appeals each year; the workload of the Advice Branch is similarly voluminous. For the NLRB to comply with the requirements of the Freedom of Information Act and the requests of your Committee made pursuant thereto competent personnel and additional funds would have to be earmarked for this endeavor. However, your Committee believes the Board's obligations under the Freedom of Information Act cannot be indefinitely delayed and that, in accordance with Congressional will expressed in the Act, the Board should immediately undertake the preparation of an index and other suitable procedures for public access to the *Advice and Appeals Memoranda*.[6]

---

[6] Setting aside semantic discussion over whether the Board presently has a "Book of Digests" as described by Professor Davis, or some other orderly filing and indexing system whereby personnel on the Appeals and Advice staffs may gain access to accumulated decisions, recommendations, policy statements, etc., it is clear that the preparation of an index would assist (in addition to the public), those agency personnel who *should be* considering what past actions have been taken by the Office of the General Counsel.

7. CONCLUSION

Your Committee is of the view that the continuing dialogue between it and the NLRB's Liaison Committee has produced significant results. As noted, the expansion of the *Field Manual*, the availability to the public of both the *Litigation* and *Trial Examiner's Manuals*, and the joint efforts to arrive at common understanding regarding disclosure of other materials demonstrates that, over a period of time, progress does flow from the reasoned exchange of ideas and opinions.

There is, nevertheless, a need for further expansion of "Government policy and attitude toward disclosure of information."[7] Your Committee believes that the Board should reconsider its previous decision which results in the restricted use of the *Litigation Manual* to Regional Office libraries. The *Trial Examiner's Manual* should also be made available to all members of the public on an equal basis. We further believe that, notwithstanding recognized limitations on staff and budget, the Board should immediately undertake the preparation of an index of previously unpublished material, commence to publish digests of appeals and advice cases, as well as an index and availability file of Advice Branch and Office of Appeals Memoranda. To these ends your Committee believes that full cooperation and assistance through Committee personnel should be offered to the Board for whatever advisory or other purpose its members might perform.

---

[7] "A reading of the [Freedom of Information] act and its legislative history indicates that it was Congress' overriding concern that disclosure be the general rule, not the exception; that all individuals have equal rights of access; that the burden be on the agency to justify the withholding of a document, and not the person who requests it; that individuals improperly denied access to the documents have a right to seek injunctive relief in the courts' and that there be a change in Government policy and attitude toward disclosure of information." Staff of Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 90th Cong., 2d Sess., "The Freedom of Information Act" (Ten Months Review) 3 (Comm. Print 1968).

EXHIBIT 2

PROCEDURE UNDER THE NATIONAL LABOR RELATIONS ACT 233 (1971)

5. ADVICE AND APPEALS MEMORANDA AND INDICES THEREOF

Last year your Committee requested that all decisions of the General Counsel resulting in his refusal to issue a complaint be made public, and that an index of all such decisions and advice or appeals memoranda supporting such decision, also be made available to the public. To establish the statutory and legal basis for your Committee's request, the 1970 Committee Report, Vol. 2, pp. 6-9, detailed the applicable provisions of the Freedom of Information Act, 5 U.S.C. § 552(a)(2)(A), (B) and (C), as well as analogous judicial authority.

This year, your Committee continued to press for an orderly and meaningful index for advice and appeal memoranda reflecting final agency action in cases where complaint is not issued. The representatives of the General Counsel took issue with the statement of Professor Davis in his book, *Discretionary Justice* (p. 206), disclaiming the existence of a "book of digests" which Professor Davis described as an index of decisions from the Advice Branch and Office of Appeals. The General Counsel's representatives asserted that the Advice Branch and Office of Appeals do not prepare memoranda of the character held to be subject to disclosure under the Act,[1] or an index thereof.

With regard to advice functions, it is noted that when a case is referred by the Regional Office to Washington for advice, a separate file for that case is opened by the Advice Branch. This advice file includes the Region's request for advice, the memorandum prepared by the

[1] This position was also asserted formally in an agency letter of February 27, 1970, to Professor Davis of the University of Chicago. But note, the letter to Professor Davis further asserted: ". . . however, a set of [memoranda] is retained by the Advice Branch, classified and filed according to the issues raised in each case. . . ."

Advice attorney for consideration at the "agenda," the memorandum prepared at the conclusion of the "agenda," together with the memorandum returning the case to the Region. The advice file will also contain memoranda reflecting post-complaint matters or other subsequent advice rendered in the case, if any. With regard to appeals cases submitted to Washington upon a Regional Director's refusal to issue complaint, the previously described procedures and functions are essentially the same.

Thus, notwithstanding the fact that pertinent and issue-controlling memoranda do exist and either are indexed or "classified," or can be indexed and digested in an orderly manner, the General Counsel has taken the position that the only document disclosable under the Freedom of Information Act is the letter from the Regional Director or the Office of Appeals advising the charging party (or appellant) that the issuance of complaint does not appear warranted. And even as to these letters, the General Counsel asserted that the Freedom of Information Act does not require either the indexing of dismissal letters or its making public of the "classification," *supra.* In support of this assertion, the Liaison Committee took the position that the only material required to be indexed was that which was relied upon and cited as a precedent. Since refusals to issue complaint are not so cited, and, according to the Liaison Committee, are not even made available to regions other than in the region in which the case originates, it rejected the notion that a statutory obligation for indexing existed. Finally, while acknowledging that an index would serve a useful purpose within the agency itself, the Liaison Committee indicated that under present restrictions on its budget and with limited manpower, the NLRB could not, even as a matter of accommodation, comply with your Committee's request for the preparation of a meaningful index.

In the *1970 Report of the Section of Labor Relations Law*, Vol. II, p. 7, n.2, your Committee drew an analogy between the function of the advice and appeals memoranda and the "no-action" letters prepared by staff personnel of the Securities and Exchange Commission, not-

ing that the SEC's "no-action" letters and memoranda indicate that on the basis of submitted facts and applicable law and rationale, "no [legal] action" will be taken. As your Committee there reported, "the Administrative Law Conference of the United States during June 1970, 'overwhelmingly approved a recommendation that the [SEC] publish "no-action" letters issued by the SEC or its staff.' 38 L.W. 2657, 2658."

Since last year's report, the SEC has taken affirmative action to comply with the Conference's recommendation. Thus, on July 14, 1970, the SEC issued a Notice of Proposal to change Section 200.81 (17 C.F.R. 200.81) concerning public availability of requests for no-action and interpretative letters and the responses thereto by the Commission's staff. Thereafter, on October 29, 1970, the Commission issued a release indicating its adoption of changes which were based upon comments received from members of the Bar and the public. The new section and procedures, which became effective on December 1, 1970, provide, in part, that "no-action and interpretative letters and the responses thereto will be available for inspection or copying thirty days after the staff has given or sent the responses to the person requesting it." Under this procedure, *all* such letters and interpretations will be deemed available to members of the public, and exceptions will be allowed for a delay "not exceeding ninety days after the expiration of such thirty days" where sufficient considerations can be presented to justify agency discretion in according confidential treatment to the specific material. In such cases, the burden shall be upon the individual requesting confidential treatment to "clearly show" the basis therefor, and where confidential treatment is accorded it will be "limited to the minimum period necessary under the circumstances," but in no event beyond the 90-day period.

Further, the SEC contemplates that "from time to time where the subject matter of a no-action or interpretative letter is of particular interest or importance, such letter and response thereto will be published in summarized form in the Commission's daily News Digest. This will call attention to the position taken in the staff's

response and interested persons can, if they so desire, inspect the full text of the letter and response thereto in the public file." As the foregoing provision makes clear, the SEC has already adopted and incorporated in its rules a position which your Committee has repeatedly urged upon the General Counsel. Thus, your Committee has urged that all advice and appeals memoranda and decisions be made available to the public and that significant decisions or rulings which warrant special circulation and broad coverage be circulated by the General Counsel either in the weekly summary of developments or in the quarterly report of the General Counsel on case handling. This would then alert the public as to the more significant developments, thereby providing the Labor Relations Law Bar with better insight and guidance regarding matters falling under the jurisdiction of the General Counsel's office.

Finally, the SEC adopted what is tantamount to an "index" system to facilitate access by members of the Bar and the public to the particular statutory ruling or provision involved. The "indexing" provisions appear as a "Note" to Section 201.81(b) of the Rules and the SEC, on January 25, 1971, adopted specific procedures applicable to requests for no-action or interpretative letters. The specific provision of the "Note" in Section 201.8(b) requires that all requests for interpretative advice or no-action positions "shall indicate prominently, in a separate caption at the beginning of the request, each section of the Act and each rule to which the request relates." In commenting on this provision, the SEC has stated that comments from the Bar and the public with regard to the proposed rule "indicated concern that the requests and responses thereto should be available *in a form* which will facilitate reference to those relating to a particular section or rule. Cooperation of the Bar and other persons in complying with the note to paragraph (b) will aid in accomplishing this result." (Emphasis added). Here again, your Committee would urge the NLRB to devise a comparable, meaningful "index" or other retrieval system whereby members of the Bar would be in a position to have advice and appeal memoranda and decisions

"available in a form which will facilitate reference to those relating to a particular section or rule" or other topical basis.

Your Committee fully comprehends the Board's budgetary and manpower limitations. But, as previously noted. notwithstanding similar limitations on manpower and budget, the Securities and Exchange Commission has responded to a similar and long-pressed need of its practitioners (and the public at large) by taking the initiative in making its corpus of Agency no-action developments available to the public, and developing meaningful "indexing" procedures so access will be enhanced. Surely the NLRB is at least as flexible and resourceful as other governmental agencies in devising ways to give substance to its obligations under the Freedom of Information Act, notwithstanding ever present limitations on time, money and manpower.

As will appear, *infra*, the Board has been engaged in litigation under the Freedom of Information Act and, understandably, it may be reluctant to make concessions which might adversely affect its legal posture in pending cases. However, your Committee has not been apprised of any pending or contemplated cases which involve, or would be affected by, the Board's compliance with your Committee's request for advice and appeal memoranda and indices. Whether viewed as a research tool, or as the only source of relevant law on a particular administrative issue, the fact remains that the General Counsel's decisions not to issue a complaint do, in fact, constitute final agency action and, as aptly phrased by Professor Davis, in many areas "[such] General Counsel's decisions constitute the only relevant law. . . ." Accordingly, your Committee shall continue to vigorously urge the Board to recede from its position and undertake the publication of whatever index or "classification" which may exist, as well as the preparation of an index, and to make available to the public copies of advice and appeal memoranda and decisions in cases where the General Counsel declines to issue a complaint.

6. NLRB—FIA LITIGATION

The NLRB has been directly involved in litigation arising under the Freedom of Information Act in the following 7 cases:

1. *Pavone* v. *Kennedy* (C.D. Cal., Case No. 67-1181-WPG, 1968) (unreported).

This case involved an effort by plaintiff to obtain from the NLRB the names and addresses of employers against whom charges or election petitions were filed in order to use the information as a business solicitation source. The suit was dismissed by the court upon a docket entry with no formal order appearing. We are informed that the Board now makes available such information in its Regional Offices.

2. *Local Union No. 560, IBTCHWA* v. *N.L.R.B.* (D. N.J., Case No. 46-68, 1968) (unreported).

Plaintiff union had been charged with violating § 8(b)(3) of the Act and a companion suit had been instituted under § 301, charging the union with violation of a no-strike clause. In this litigation, the union brought suit to compel the Board to turn over an affidavit obtained by a Board agent during the investigation of the 8(b)(3) charge. The court accepted the Board's argument that the affidavit was privileged under exemption (7) of the Freedom of Information Act, as it was part of an "investigatory file compiled for law enforcement purposes." The suit was dismissed upon a docket entry, with no formal order appearing.

3. *Government Employees' Insurance Co.* v. *McLeod*, 96 LRRM 2186 (S.D.N.Y., 1968).

In this proceeding the employer sought a preliminary injunction restraining the NLRB from conducting a representation hearing.

* * * *

III

PROCEDURES OF THE GENERAL COUNSEL'S OFFICE OF APPEALS AND THE REGIONAL ADVICE BRANCH

This year your Committee continued its conference with the Liaison Committee regarding the operations and procedures of the Office of Appeals and the Regional Advice Branch. The following constitutes the report of your Committee's study and conference.

1. THE REGIONAL ADVICE BRANCH

It is the responsibility of the Advice Branch to analyze and interpret Board and Court decisions to determine areas of the law which are unclear or in a state of flux and to assist the General Counsel in considering and selecting cases which may give direction to the law in those, as well as new or novel areas.[3]

In discharging its responsibility, Regional Directors are advised with respect to the issuance of complaints in particular types of cases. Advice also "follows-up" on cases submitted to it. It reviews complaints, analyzes Trial Examiners' decisions dealing with the issues on which advice was given, assists in preparing briefs to the Trial Examiner, and provides exceptions, briefs and oral argument to the Board.[4]

A. *Operations of Advice Branch*

Matters come to the attention of Advice essentially in 2 ways: (1) standing instructions are issued to the Regions to automatically submit certain types of cases

---

[3] The General Counsel holds the view that the Office of Advice serves a purely internal agency function of assisting in policy decisions and maintaining uniformity of administration in the field.

[4] However, in cases involving § 10(1) relief, Regional Directors seek "advice" from the District Court Section of the Division of Law, and "advice" in cases involving § 10(j); and § 10(c) relief is sought from the Enforcement Section.

or certain issues; (2) Regional Directors may, at their discretion, solicit advice on any case or issue.

Those matters which must be submitted for Advice are set forth in the "non-public" Field Manual maintained at the Regional Offices and supplemented from time to time by the General Counsel's Office in Washington. The General Counsel disclosed the specific areas currently requiring mandatory submission to Advice, and agreed to update this information in subsequent issues of the Quarterly Report on Case Developments.[5]

In any case in which advice is sought, the Regional Office submits its file together with a summary of the evidence, a listing of the issues, and the Region's recommendation for disposition of the case. (Any difference of opinion within the Region may be noted). In Advice, the case is assigned to an attorney and his supervisor for review, research and analysis. Parties to a case have the opportunity, upon request, to orally present their position to the Office of Advice. There are few such oral presentations, but where granted, other parties

---

[5] The General Counsel advised your Committee that the areas where submissions for Advice are currently required were those set forth in his Quarterly Report on Case Developments released January 26, 1968, which listed as areas of then current advice interest: lockouts; the impact of *Wiley* v. *Livingston*; a union's duty of fair representation under *Vaca* v. *Sipes* and *Miranda*; union fines; the effect of *National Woodworkers* on Section 8(e) issues; and the implications of *Pennington* and *Jewel Tea*.

In the General Counsel's most recent Quarterly Report on Case Developments (covering the period ending March 31, 1971) the following items appear to be of current "advice" interest: whether a union violates Section 8(b)(3) by insisting upon arbitration of a grievance relating to the scope of the unit despite a Board unit determination to the contrary; whether a union violates Section 8(b)(1)(A) by fining a member for instituting a civil action under Section 301 without exhausting internal union procedures; whether an employer violates Section 8(a)(5) by proposing a contract provision which would permit the employer to withdraw recognition from the incumbent union in the event it fails to achieve certification in the then-pending representation proceeding; and whether an employer violates Section 8(a)(1), (3) and (5) by refusing to modify a practice, supported by provisions of the collective bargaining agreement, which permits discrimination in employment based upon sex.

having interest are notified and afforded an equal opportunity. Thereafter, analysis and recommendations are presented by written memoranda and, on occasion, orally to what is termed the "Agenda." The "Agenda" consists of the members of Advice who prepared the case, the Branch Chief, the General Counsel's Special Assistant, and such other members of the General Counsel's staff as the case may warrant. In more important cases, a "General Counsel's Agenda" is held, i.e., one in which the General Counsel personally participates.

At the Agenda, a final decision is usually reached. The theory on which the determination is based could be the theory or theories advanced by the Region, the minority in the Region, one of the parties in interest, or a theory developed independently by Advice. An Advice memorandum setting forth the precedents, theories and analyses supporting the determination is prepared. The General Counsel indicated that, on occasion, the Advice memorandum will specifically refer to a prior Advice memorandum on the same subject. The General Counsel alleged that such reference was not construed to give any precedential effect to the prior Advice memorandum; rather, he alleged it was a time-saving device whereby, when the Office of Advice will have submitted an exceptionally detailed and thorough analysis of a particular case, it facilitates matters to simply refer to that prior memorandum.[6]

B. *Notice to Parties of Referral to the Advice Branch*

The General Counsel stated that it was not the policy of his office for either Advice or the Regional Office to

[6] The example given was the *Pittsburgh Plate Glass Co.* case, involving retired employees and their status *vis-à-vis* collective bargaining obligations of an employer. In handling questions involving retirees, the Advice Branch would have responded to a Regional Director by referring to its prior analysis (in the *Pittsburgh Plate Glass Co.* case) and enclosing a copy thereof if the Regional Director had not already obtained such prior Advice memorandum. The General Counsel did indicate that Advice determinations in specific cases of general importance are at times distributed to all Regional Offices.

notify the parties in interest that a case has been submitted to Advice. He contended that such a policy would present too great an administrative burden. However, he emphasized that the Regional Director would, *upon request*, advise a party that a case had been submitted to Advice, but would not indicate the nature of the issue on which advice was sought.

Your Committee recommended that the General Counsel should adopt and promulgate a uniform rule that Regional Offices notify all parties when a case has been submitted to the Advice Branch. The General Counsel has formally rejected the request of your Committee as being neither desirable nor operationally feasible. Your Committee adheres to its view.

C. *Regional Action Based Upon the Advice Response*

The response to the Region from the Office of Advice sets forth a course of action to be followed by the Region: either issuance of a complaint absent settlement, dismissal of charges absent withdrawal, or further investigation. The Regions must follow the course outlined in this Advice response. The response to the Region will sometimes include specifics with respect to the kind of settlement or other action, and will set forth the theories upon which such course of action is based. The parties generally do not learn of the theories set forth in the advice response where the result is a withdrawal or settlement. Where the result is dismissal, the Region's letter may or may not restate the Advice response. However, in no instance will the reasoning or conclusion be identified as that of Advice. Where a complaint is issued based upon advice having been sought, the parties will discover the theories of the General Counsel in the course of the unfair labor practice hearing.

Your Committee recommended that the General Counsel should adopt a rule of uniform policy that any Advice memoranda of general application distributed to the various Regional Offices should be made available to the public. Your Committee's request was refused on the ground that these were privileged intra-agency memo-

randa and that, moreover, significant decisions of the Advice Branch are set forth in the Quarterly Report. Your Committee adheres to its view.

2. THE OFFICE OF APPEALS

The Office of Appeals, within the last year, changed its policy concerning oral presentations by parties.

In the past, oral argument had been granted upon request. It is now limited "to cases where it will tend materially to advance resolution of the issues." Criteria for determining under what circumstances oral argument will be granted are currently being formulated. Oral argument is currently being granted where the case presents novel or important issues of law or the facts are unusually complex. Since adoption of the policy, oral argument has been granted in 12 cases. No parties beyond those immediately involved in the case are advised of the cases or issues to be argued orally; however, the General Counsel anticipates that "most" cases which are argued orally will be the subject of discussion in one of his Quarterly Reports on Case Developments.

This year, your Committee discussed with the General Counsel specific practices involving appeals from formal settlement agreements. A formal settlement agreement is one usually entered into after issuance of a complaint and provides for the entry of a Board Order and consent that such Order may be enforced in the Court of Appeals. In cases involving unilateral formal settlements after the charging party has stated his objections, the matter is forwarded to the office of the General Counsel for review before submission to the Board for approval. The Rules do not provide for an "appeal" to the General Counsel. The appeal is to the Board prior to its approval of the proposed settlement. However, it is possible for a party to secure from the General Counsel an "operational review" of the proposed settlement. This "operational review" is similar in many respects to an appeal in that the party may, in addition to submitting written arguments, appear personally and argue orally before

the General Counsel prior to his approval or disapproval recommending such formal settlement to the Board.

The General Counsel, in discussing the operations of the Office of Appeals and the Advice Branch, noted that he viewed the 2 operations quite different conceptually. The General Counsel views the appeals, which exist by virtue of the Board's Rules, as part of a party's procedural process and, to that extent, the operations of the Office of Appeals are viewed as "public." The Advice Branch, on the other hand, is viewed by the General Counsel as serving a purely internal agency function designed to assist in making policy decisions and maintaining uniformity of administration in the field.

EXHIBIT 3

GENERAL COUNSEL'S MINUTE

Emhart Corporation
Case No. 1-CA-5727

Appeal from the Regional Director's refusal to issue an 8(a)(1) and (5) complaint based on a charge filed November 22, 1966, by UAW Local 326, alleging that the Company refused to supplement an existing collective-bargaining agreement in compliance with its obligation under a letter of agreement between the parties.

ACTION

Appeal denied.

REASONS FOR ACTION

Under all the circumstances, it could not be established that the refusal to grant the Union's request was for any reason other than the Company's good-faith interpretation of the terms of the supplemental agreement.

/s/ A. O.
Arnold Ordman
General Counsel

Dated: 1/24/67

EXHIBIT 4

GENERAL COUNSEL'S MINUTE

Diaz Drayage Company
Case No. 15-CA-2909

Appeal from the Regional Director's refusal to issue an 8(a)(1) and (5) complaint based on a charge filed September 6, 1966, by Local 270, IBT, alleging that since June 27, the Company refused to bargain with the Union.

ACTION

Appeal denied.

REASONS FOR ACTION

Under all the circumstances, including the ambiguous and self-contradictory language contained in the addenda, all of which related to contract duration, insufficient basis existed for a finding that the Company had acted in derogation of its statutory bargaining obligation in refusing to sign the contract proffered by the Union.

/s/ A. O.
Arnold Ordman
General Counsel

Dated: 4/26/67

EXHIBIT 5

GENERAL COUNSEL'S MINUTE

Technical Papers Division, Morart Plant, The Mead Corporation
(Dayton Local 60-P, Lithographers and Photoengravers Int'l. Union)
Case No. 9-CA-4362

Appeal from the Regional Director's refusal to issue an 8(a)(1) and (5) complaint based on a charge filed July 24, 1967, by Lithographers and Photoengravers International Union, alleging that the Company had refused to approve a collective bargaining agreement fully negotiated and agreed upon orally on June 9, 1967 between the Company and Union.

ACTION

Appeal denied.

REASONS FOR ACTION

The evidence established that the parties had agreed in principle to the terms of an agreement but there had been no meeting of the minds as to the language to be used when reducing the agreement to writing. Under the circumstances, insufficient basis existed for finding an unfair labor practice based upon the Company's refusal to execute the written contract submitted by the Union.

/s/ A. O.
Arnold Ordman
General Counsel

Dated: 11-1-67

EXHIBIT 6

GENERAL COUNSEL'S MINUTE

IUE Local 963
(Phelps Dodge Magnet Wire Corp.)
Case No. 25-CB-646

Appeal from the refusal to issue a complaint based on an 8(b)(1)(B) and (3) charge filed November 15, 1968 by Phelps Dodge Magnet Wire Corporation, alleging in substance that since about September 30, the Union has refused to bargain in good faith.[1]

ACTION

Appeal denied.

REASONS FOR ACTION

It was concluded, for substantially the reasons set forth in the summary report accompanying the Regional Director's dismissal letter of May 29, 1969, that further proceedings herein were unwarranted.

/s/ A. O.
Arnold Ordman
General Counsel

Dated: 8/20/69

EXHIBIT 7

GENERAL COUNSEL'S MINUTE

McIntosh Motors, Inc.
Case No. 17-CA-3183

Appeal from the Regional Director's refusal to issue complaint based upon an 8(a)(1) and (5) charge filed March 23, 1967, by IAM District 71, alleging that since December 22, 1966, the Company has refused to give effect to the provisions of a contract entered into with the Union July 29, 1966, and has otherwise refused to bargain in good faith with the Union.

ACTION

Appeal denied.

REASONS FOR ACTION

Under all the circumstances, including the evidence that the Company withdrew all authority from the Association to bargain for it both in 1963 and 1966, that the parties conducted separate negotiations for the 1963 contract, that the July 1966 letter of intent appeared to contemplate separate negotiations following conclusion of the Union's negotiations with the Association, and since the March 31 agreement on its face reflected that the parties had agreed to modifications of the Union-Association agreement, insufficient basis existed for a finding that the Company was bound by Association bargaining or the contract resulting therefrom. In these circumstances, the Company's failure to prepare a draft of the agreed-upon contract for the Union's signature was deemed insufficient to warrant further proceedings.

/s/ A. O.
Arnold Ordman
General Counsel

Dated: 7-21-67

EXHIBIT 8

GENERAL COUNSEL'S MINUTE

Iowa Conference of Teamsters and Local No. 99 et al.
(Heavy-Highway Labor Relations Council of Iowa)
Cases Nos. 18-CC-251
18-CB-314

Appeal from the refusal to issue an 8(b)(3), and 8(b)(4)(ii)(A) and (B) complaint based on charges filed June 24, 1968, by the Heavy-Highway Labor Relations Council of Iowa, alleging respectively that the Iowa Conference of Teamsters and its local affiliates have refused to execute the Heavy and Highway Construction Agreement for the State of Iowa; attempted to withdraw from multi-union and employer association negotiations in order to obtain terms contrary to the negotiated agreement; insisted on negotiation of matters not proper subjects for bargaining; withdrew proposals made by them and accepted by the association; and coerced the Council to cease doing business with other persons and enter into an agreement prohibited by Section 8(e) of the Act.[1]

ACTION

Appeal denied.

REASONS FOR ACTION

Under all the circumstances, including the provisions on page 10 of the draft agreement for the parties' individual acceptance thereof, it could not be established that there was a multi-employer bargaining unit or that the spokesmen for the Heavy Highway Labor Relations Council and the Union at the negotiations had the authority to bind any of the individual Companies or Unions to any agreement reached by Hoffman and Rowley in their negotiations. Therefore, the burden could not be met of

showing that Teamsters' refusal to execute the written contract incorporating the agreement allegedly reached between Hoffman and Rowley, and its submission of proposals which would detract from provisions already agreed upon, violated the Act. Nor did the evidence indicate that the Union negotiators had insisted to impasse that any particular nonmandatory bargaining proposal be accepted by the Council. With regard to the alleged 8(b)(4)(ii)(A) and (B) conduct, there was no evidence of threats, coercion or restraint on the part of the Teamsters. Accordingly, further proceedings were deemed unwarranted.

/s/ A. O.
Arnold Ordman
General Counsel

EXHIBIT 9

GENERAL COUNSEL'S MINUTE

Detroit Newspaper Publishers Assn.
The Detroit News, Detroit Free
Press: Detroit Mailers Union No. 40, ITU
Case Nos. 7-CA-6916-1-3
7-CB-1818-1-3

Appeal from the refusal to issue 8(a)(1)(A) and (3) and 8(b)(1)(A) and (2) complaints based on charges filed August 19, 1968, by Joe Wellman, John Rahie (individuals) and Detroit Mailers Union No. 4, IMU, alleging in substance that the Newspaper Assn. (acting on behalf of its members) and the ITU have agreed to a pension plan in which participation is dependent on membership in the ITU, thereby discriminating against nonmembers and interfering in the employees' exercise of their Section 7 rights.

ACTION

Appeal denied.

REASONS FOR ACTION

In view of the attached amendment to the ITU Negotiated Pension Plan, further proceedings herein would not effectuate the policies of the Act.

/s/ A. O.
Arnold Ordman
General Counsel

Date: 11/14/69

AMENDMENT OF PAST SERVICE CREDIT PROVISIONS OF ITU NEGOTIATED PENSION PLAN

RESOLVED, that Section 4.01 of Article IV of the ITU Negotiated Pension Plan be and the same hereby is amended, effective as of July 1, 1969, as follows:

The entire last paragraph of the section shall be deleted and, in place thereof, a new paragraph shall be substituted so that Section 4.01 in its entirety shall read as follows:

"Section 4.01 Past Service Credit

Past Service Credit shall be given to a Participant for each month of his continuous full time employment as a journeyman during the period immediately prior to his Applicable Effective Date, computed to the nearest whole month, provided such period of continuous full time employment began prior to January 1, 1967. The total of the months so credited shall be divided by twelve to obtain years of past service. No Participant shall be eligible for Past Service Credit who, prior to becoming a Participant, received any pension payment pursuant to Article XX, ITU By-laws.

If, in the opinion of the Trustees, the granting of Past Service Credit in a given situation would adversely affect the actuarial reserves of the Plan, they shall, by rules uniformly applicable to all persons similarly situated, reduce the amount of Past Service Credit granted."

EXHIBIT 10

This Section 8(a)(5) case was submitted for advice because it involved a novel question of law concerning a union's withdrawal from multi-union, multi-employer bargaining.

It was concluded that further proceedings on the charge filed by the Union are unwarranted, since the Employer was in the circumstances considered to be privileged in refusing to bargain separately with the Union and in reaching an agreement with the multi-union group, which agreement covered, *inter alia*, the Union, over the Union's protests that it had withdrawn from the multi-union bargaining.

The bargaining history and language of the two previous contracts were viewed as establishing a multi-union, multi-employer bargaining relationship, in which the individual locals of the Union's International Union as well as the International Union and the Negotiating Committee, constituted a joint representative of the employees in a merged unit. In this regard, it was noted that in 1965 a multi-union multi-employer Western States contract was negotiated by a committee consisting of representatives from several locals and from the International Union. The contract was approved by a majority of votes of all covered employees in the overall multi-union multi-employer unit. Although the Union did not directly participate in these joint negotiations and refused to execute the Western States agreement because of dissatisfaction with the agreement among its members, the contract was executed for and in behalf of the Union by an International Union representative and was put into effect in the territorial jurisdiction of the Union without objection from the Union. In 1968, at the request of the Union, a business representative of the Union was appointed to the multi-union negotiating committee, participated in the negotiations and signed the contract as a member of the union negotiating committee. And despite the apparent dissatisfaction with the agreement and the local supplement among members of the Union,

representatives of the Union signed the local supplement as well, because a majority of employees in the overall multi-union multi-employer unit had approved the supplements. Finally, the agreements state that the "Union" consists of the Union International and its affiliated locals party to the agreement, and are signed by the Union International and by the Negotiating Committee of the Union International, for and on behalf of numerous local and districts, including the Union.

Based on the foregoing, it was concluded that a multi-union multi-employer bargaining relationship existed and that the individual locals of the Union's International, including the Union, constituted the joint representative of the employees in a multi-employer unit at the time the Union attempted to withdraw from multi-union bargaining. In such circumstances of multi-union bargaining and joint representation, the *Retail Associates*[1] principle involving withdrawal from *multi-employer* bargaining by timely notice was considered inapplicable. Rather, where units represented by various labor organizations have been merged by consent and the unions represent the employees and bargain jointly for the overall unit, the *filing of a timely petition* was considered to be the appropriate course for a constituent union seeking withdrawal from the multi-union group.

Thus, with respect to withdrawal from multi-union bargaining, the Board stated in *Evening News Association*, 154 NLRB 1494, 1498:

> . . . in multiunion bargaining, once a broad unit has been established by consent, one of the constituent unions could not generally change the unit by unilateral action;[13] but neither would the employer be

[13] This is generally but not always true. One of the constituent unions could sever a segment of the broader unit, *if it filed a petition with the Board at an appropriate time*, and if the smaller unit were otherwise appropriate. (Emphasis supplied.)

[1] *Retail Associates, Inc.*, 120 NLRB 388.

permitted to do so. A similar situation exists with respect to single-employer, multiplant units. In these types of cases, employer and union are treated alike. Neither can break up the unit.

And the decisions in *American Pipe and Construction Co.*, 169 NLRB 1024 and *United Metal Trades Association*, 172 NLRB No. 52, support the view taken here that in multi-union bargaining mere timely notice of a desire to withdraw will not suffice to sever the union from the multi-union group.[2]

In view of the above, the Union's attempt to withdraw from multi-union bargaining by giving timely notice to all parties, but without filing a petition, was considered ineffective. And where, as here, the unions involved have followed the historical method of contract negotiation and ratification and the Employer has been notified by the unions that such ratification has taken place, the Employer was considered privileged in relying on the ratification[3] and in executing the current agreement covering the Union with the multi-union group.

Accordingly, the charge should be dismissed, absent withdrawal.

G.B.

ROF-1

---

[2] In the cited cases, the Board indicated that a union did not have an automatic right to withdraw from multi-union bargaining on the same terms as an employer may withdraw from multi-employer bargaining, but rather that any right of a union to withdraw from multi-union bargaining would be contingent, at least, on the appropriateness of the separate unit sought by the union.

[3] Cf. *M & M Oldsmobile, Inc.*, 156 NLRB 903, at pp. 905-906.

EXHIBIT 11

This confirms telephonic authorization of January 7, 1971 to issue 8(b)(3) complaint to place issue before Board and to dismiss 8(a)(5) charge.

With respect to 8(b)(3) charge, concluded in agreement with Region that prior to 1970 parties had negotiated in multiemployer unit consisting of all linen suppliers in city except for companies A and B. Also noted that this multiemployer group negotiated 1967 agreement and none of employers in group withdrew from bargaining on multiemployer basis. Further concluded that Union failed to unequivocally withdraw from multiemployer unit prior to actual beginning of negotiations on November 12, 1970. In this regard, Union statements of November 12, 1970 considered equivocal since Union never clearly stated it was withdrawing from bargaining on group basis but demanded that bargaining be conducted in same way as it had been in past, which, as concluded above, was on a multiemployer basis. Also noted that in past Union considered bargaining to be on multiemployer basis. Union's reservation of position on November 12, 1970 not considered to make Union withdrawal of December 7, 1970 timely because Union only reserved right to bargain as in past, viz., without association participation, Union did not reserve right to bargain individually.

In circumstances Union considered as refusing to bargain with employer group through association. And this refusal not viewed as privileged since it was not unequivocal withdrawal from bargaining on established multiemployer union basis and formation of association had not changed unit.

Fact that association letter of November 6, 1970 referred to only nine employers not considered to warrant contrary result. Affidavits show that as of beginning of actual negotiations on November 12, association had been designated in some form as representative for bargaining by all employers in historical multiemployer unit. Union never claimed to be confused by letter of November 6, 1970 as to number of employers in bargaining group

and did not raise that as reason for refusal to bargain on multiemployer basis. And, by meeting of November 24, 1970, any arguable defect in employer's request for bargaining considered cured since association at that time indicated to Union that it represented all employees in historical multiemployer unit.

In addition, strike considered 8(b)(3) violation to extent that it was in support of Union's unprivileged position.

In light of above, employer's responsive lockout would be privileged and association's demand for bargaining only on group basis also considered privileged. Accordingly, further proceedings on Section 8(a)(3) and 8(a)(5) charge, deemed unwarranted. With respect to 8(a)(3) allegation in charges filed December 30, 1970, Region may proceed at its discretion.

Two ROFs are being returned under separate cover.

Gerald Brissman
Assistant General Counsel

1/8/71—11:10 am

5750

EXHIBIT 12

Consideration was given to the contract provisions in the Master Agreement submitted by the Region with its memorandum of February 23, 1968. It was concluded that the Region should proceed in accordance with the initial Advice authorization dated February 16, 1968.

G. B.

RØF-1

In all the circumstances, it was concluded, in accordance with the Region's recommendation, that the 8(a)(5) charge should be dismissed, absent withdrawal. In agreement with the Region, the Employer's withdrawal from the multi-employer association of May 8, 1967, was considered timely, even though it occurred after the Union's March 15, 1967, notice to open the contract, since it was made substantially before a date was set to begin negotiations for a new contract.[1]

G. B.

ROF-1

[1] See *Evening News Association, Inc.*, 154 NLRB 1494, at 1495; *Retail Associates, Inc.*, 120 NLRB 388, at 395. It was also noted that the Union considered the withdrawal on April 16, 1967 by another member of the association to be timely despite the fact that this withdrawal also occurred after the Union's notice to open the contract.

EXHIBIT 13

COLE, ZYLSTRA & RAYWID
Attorneys at Law
2011 Eye Street, N.W.
Washington, D.C. 20006

Area Code 202
659-9750

Cable Address
"Czar"

March 1, 1972

Peter Nash, Esquire
General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue
Washington, D.C.

Re: Sears, Roebuck and Co. v. National Labor Relations Board, United States District Court for the District of Columbia, Civil Action No. 1571-71 and Retail Clerks Union, Local 4, Retail Clerks International Association, AFL-CIO and Sears, Roebuck and Co. Case No. 19-CB-1673

Dear Mr. Nash:

As you know, the undersigned has been continuously engaged for the past two weeks in reviewing Appeals Memoranda or decisions deemed essential to charging party's preparation in Board Case No. 19-CB-1673, now scheduled for hearing on April 6, 1972. Because an appeals index is not yet available, it has been necessary to review each of these memoranda to identify those which, like Case No. 19-CB-1673, involve issues relevant to the time limits of withdrawals multi-employer bargaining units. Despite our diligent efforts, however, we have to date only been able to sift through approximately 1,000 of the total estimated 8,000 cases to be made available to us. At this rate, it is estimated that it will be impossible to complete this review before the latter part of May or the first part of June. For that reason, and in view of the importance of these materials to our preparation, we have this date formally requested an extension

of the hearing to a date no earlier than June 5, 1972. A copy of the letter to the Regional Director requesting such postponement is attached hereto.

Such extension is also made necessary by the fact that a substantial percentage of the memoranda supplied to us are essentially unintelligible in their present form because of the lack of any description of the factual predicate constituting the basis for the decisions. Indeed, in the course of our review we have noted that most of the Appeals Memoranda merely indicate that the decision is based on the "circumstances of the case" without indicating what those facts or "circumstances" are. As a result, unless we are supplied with additional information disclosing the factual indicia for such determinations, such memoranda may be of little or no practical utility to our client or to the public generally.

For that reason, we recently requested that your representative make such underlying data and/or documentation forming the basis of such decisions available for public inspection and/or copying. This request was made with respect to those cases which, as a result of our review, appear to have particular pertinence to the issues involved in 19-CB-1673. This data will consist, for example, of collective bargaining agreements or similar documents upon which the memoranda relied in disposing of the case. In some instances we have noted that the memoranda rely upon the language of agreements without identifying the content of such language. Since none of this information can be considered of a confidential or privileged nature, we believe that we are entitled to such information or documentation pursuant to the Freedom of Information Act and Section 102.117 of the Board's Rules and Regulations. We therefore renew our request for such materials which your representative orally denied to us several days ago.

Because of the stricture imposed against us prohibiting any note taking during the course of our review, we cannot at this time supply you with a list of the particular cases for which such information and documentation is requested or the specific information required for each case. The particular cases involved, however, have already been flagged to your attention for reproduc-

tion and we assume that no such listing will be necessary. Furthermore, as soon as we have been supplied with copies of such memoranda, we will promptly identify the precise documentation or information needed.

In addition to the above described factual documentation, we also request copies of the underlying Regional Director's decision from which appeals have been taken, as well as the parties' briefs or arguments submitted in support of there position. We believe that the memoranda decisions can only be intelligently assessed in light of this supplemental data since, in some instances, the Appeals Memoranda simply constitute a summary affirmance of the Regional Director or make particular reference to the Director's ruling in supplying part of the basis for the appeals decision. Since Regional Directors' rulings have historically been submitted to both parties and have, therefore, been subject to public disclosure in the past, we can see no reason for withholding such rulings from us. With respect to the briefs or arguments, we believe that they could be of significant importance in shedding light on the ultimate decision reached, and therefore, such documents are also included within our request. Like the underlying Regional Directors' decisions, we can see no harm in disclosing the statements of position or arguments at this time since under the limitations imposed upon our review, the information requests are limited only to those cases where the litigation has been concluded or, if no complaint issued, to cases where no further action is contemplated.

To minimize the necessity of further delays beyond the requested June 5th date, we urge that the additional documentation and information as detailed above be supplied as promptly as possible.

If there are any logistical problems in obtaining these materials, we invite any suggestions which will help alleviate any further burden to your staff.

Very truly yours,

/s/ Jeffrey Goldman
Jeffrey Goldman
for Lederer, Fox and Grove

Enclosure

EXHIBIT 14

LEDERER, FOX AND GROVE
Attorneys at Law
Chicago Title and Trust Building
111 West Washington Street
Chicago, Illinois 60602

March 14, 1972

Philip C. Lederer
Shayle P. Fox
Kalvin M. Grove
Lawrence M. Cohen

S. Richard Pincus
Herbert M. Berman
Russell M. Kofoed
K. Bruce Stickler
David L. Evans

Area Code 312
Telephone 641-0200

Peter G. Nash, Esquire
General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C.

Re: Sears v. NLRB,
Board Case No. 19-CB-1673

Dear Mr. Nash:

After reviewing the index of Advice Memoranda, which I received today, I request copies of, or access to, the materials classified under the following rubrics:

44-33	66-54
66-50	66-56
66-51	68-53
66-53	

If there is any duplication with the Advice materials that we received earlier, I apologize; however, since I could not find classification numbers on these Advice Memoranda, it was impossible for me to determine what had, or had not, been already made available.

My client is prepared to assist you in resolving any logistical problem encountered in obtaining any of the material we have requested to date.

Again, I thank you for your assistance. I am

Respectfully yours,

/s/ Jeffrey S. Goldman
Jeffrey S. Goldman

EXHIBIT 15

LEDERER, FOX AND GROVE
Attorneys at Law
Chicago Title and Trust Building
111 West Washington Street
Chicago, Illinois 60602

April 11, 1972

Philip C. Lederer
Shayle P. Fox
Kalvin M. Grove
Lawrence M. Cohen

S. Richard Pincus
Herbert M. Berman
Russell M. Kofoed
K. Bruce Stickler
David L. Evans
Jeffrey S. Goldman

Area Code 312
Telephone 641-0200

Peter G. Nash, Esquire
General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C.

Re: Sears, Roebuck and Co. v. National Labor Relations Board, United States District Court for the District of Columbia, Civil Action No. 1571-71; and Retail Clerks Union, Local 4, Retail Clerks International Assn., AFL-CIO and Sears, Roebuck and Co., Case No. 19-CB-1673

Dear Mr. Nash:

Confirming my telephone conversation of today with Mr. Higgins, Associate General Counsel, it is my understanding that until March or April 1971, the Appeals Branch of the Board prepared and sent Memoranda (General Counsel Minutes) analyzing appeals cases to regional directors. In addition, a letter was sent to the

respective parties notifying them of action taken by the Appeals Branch.

Sometime during March or April 1971, the Appeals Branch eliminated the practice of sending the regional director a separate Memoranda; instead, the region was sent a copy of the letter sent to the parties explaining the Appeals Branch action. However, a separate Memoranda was still prepared and sent to the regional director in those instances where an appeal from a regional director's refusal to issue complaint was sustained.

In a conference on April 7, 1972, attended by Messrs. Cohen and Smetana, counsel for Sears, Roebuck and Co.; and Messrs. Bendixsen, Steele and Ms. Morris, attorneys for the Board, among other matters, there was a discussion and understanding as to the availability to Sears for inspection and copying of certain Office of Appeals documents, namely:

> Letters of the Appeals Branch sent to parties, and Memoranda sent to regional directors analyzing appeals cases.

In accordance with that understanding, my oral conversation of today with Mr. Higgins, and your letter of February 3, 1972 to Mr. Cohen declaring the letters to be public information and that the letters and memoranda would be made available to us, we hereby request that in each case where we have asked (and hereafter request) copies of certain General Counsel Minutes, that we also receive copies of both the letter sent to the parties by the Office of Appeals and the memoranda, if any, sent by the Appeals Branch to the regional directors analyzing appeal cases.

So that our review may be expedited, we urge that these materials be supplied as promptly as possible.

Very truly yours,

/s/ K. Bruce Stickler
K. Bruce Stickler
for Lederer, Fox and Grove

EXHIBIT 16

[Logo]

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570 March 7, 1972

Mr. Jeffrey Goldman
for Lederer, Fox and Grove
c/o Cole, Zylstra & Raywid
Attorneys At Law
2011 Eye Street, NW
Washington, D.C. 20006

Re: Sears, Roebuck and Co. v. National Labor Relations Board, United States District Court for the District of Columbia, Civil Action No. 1571-71 and Retail Clerks Union, Local 4, Retail Clerks International Association, AFL-CIO and Sears, Roebuck and Co., Case No. 19-CB-1673

Dear Mr. Goldman:

This will acknowledge receipt of your letter of March 1, 1972, concerning the charging party's request for a postponement of the unfair labor practice hearing in the subject case from April 6, 1972, to June 5, 1972. I am advised that Regional Director Henderson has denied your request. For the reasons set forth below, I concur in Mr. Henderson's decision.

As I have previously indicated to members of your firm, I do not believe that the information being made available to you is of any precedential value or that it is necessary to the full presentation of any issues in Board Case No. 19-CB-1673, or to the full protection of your rights as a charging party. Accordingly, I see no reason further to delay the timely conclusion of this case by postponing the hearing until you have reviewed all of the documents. The documents have been available to your firm since February 16, 1972; and this Agency

has placed no restrictions on the firm's review of these memoranda which would delay the examination.

To the extent that your request for extension of time is based on your request for additional information, I would also deny it on the ground that assuming the documents were subject to disclosure the documents now requested were not encompassed within your original request. Thus, not only did you specifically state that you were "not requesting any of the investigatory files of the Board" but you specifically limited your request to materials generated by the Office of Appeals and the Advice Branch. Additionally, retrieval of the records involved would require locating the files at one of the various Federal Records Centers, a task which would involve a substantial expenditure of time and money. To postpone the unfair labor practice hearing until such a burdensome task had been completed would have the effect of postponing the hearing indefinitely, a result which is in direct opposition to the policy of timely resolution of unfair labor practice charges. Moreover, insofar as your request for postponement is predicated on the unavailability of Mr. Lederer, I note that he is not unavailable on April 6.

Your request for additional information from the investigatory files used in reaching the Office of Appeals decision is denied. The information you request was obtained from witnesses during the investigation of an unfair labor practice charge. These documents were obtained by the General Counsel on the understanding that the information and the identity of the person supplying the information would be kept confidential unless introduced into evidence at a hearing on an unfair labor practice complaint. Files compiled by the General Counsel during the investigation of unfair labor practice charges have long been held to be exempt from disclosure on the grounds that revelation of them would hamper the Board's ability to conduct investigations and secure information from individuals in the conduct of those investigations. The Freedom of Information Act preserves the Board's right to protect its processes by refusing to release such information.

You will note that two footnotes have been deleted from two of the Appeals memoranda that have been supplied to you and an explanation for this deletion is set forth on the memoranda itself. As the substituted footnote indicates in each instance, those notes related to intra-agency procedural instructions from the General Counsel to a subordinate regional official and are exempt from disclosure under the Freedom of Information Act. The deleted footnotes contain no factual or legal references, nor does the deletion affect the substance or continuity of the decision of the Office of Appeals. The statements contained in the deleted footnotes have no adverse effect on the public or upon the parties involved in the particular case. In the circumstances the Freedom of Information Act does not require that the information be published or made available.

Sincerely,

/s/ Peter G. Nash
Peter G. Nash
General Counsel

cc: Mr. Henderson, Director, Region 19

EXHIBIT 17

LEDERER, FOX AND GROVE
Attorneys at Law
Chicago Title and Trust Building
111 West Washington Street
Chicago, Illinois 60602

May 17, 1972

Philip C. Lederer
Shayle P. Fox
Kalvin M. Grove
Lawrence M. Cohen

S. Richard Pincus
Herbert M. Berman
Russell M. Kofoed
K. Bruce Stickler
David L. Evans
Jeffrey S. Goldman

Area Code 312
Telephone 641-0200

Peter Nash, Esquire
General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20560

Re: Sears, Roebuck and Co. v. National Labor Relations Board, Civil Action No. 1671-71; and Retail Clerks Union, Local 4, Retail Clerks International Association AFL-CIO and Sears, Roebuck and Co., Case No. 19-CB-1673.

Dear Mr. Nash:

Confirming my recent telephone conversation with Mr. John Higgins, Associate General Counsel of the Board, this letter is to inform you of the present posture with respect to the gathering of information, inspection and analysis of such information pursuant to Sears' request under the Freedom of Information Act.

Since February 16, 1972, when you made available to Sears some of the information it had requested, the following has occurred:

1. We estimated that it would take, as a result of the absence of any indices, approximately two to three months to search through various Appeals and Advice Memoranda to extricate those materials pertinent to Case No. 19-CB-1673. This initial search was completed as of April 27, 1972.
2. In searching through the various materials, we requested copies of several hundred of documents. We have been provided with copies of most of these documents.
3. In some instances, where we have requested the copies of Memoranda, we have also requested underlying documentation necessary to make meaningful those documents. Such underlying documentation, we believe, will present factual circumstances that underlay the Board's holding in each case where an Advice or Appeal Memoranda has issued. Such underlying documentation will serve to fully explain the facts and circumstances surrounding the Memoranda. We need this material in order to effectively prepare for, participate in and develop a full and complete record in 19-CB-1673.
4. Moreover, our request for underlying documentation is predicated upon our belief that a party in our particular case, wherein the Board is proceeding on our behalf, should have all information necessary in order to know how to prepare for the hearing and develop the record to fully reflect our position in the trial, before the Board and in possible subsequent appeals.
5. We have also received various documents in a "sanitized" version. We have, of course, been unable to verify whether there has been a proper deletion of material. In various instances, as, e.g., where references are made to names of counsel (with whom contact would be valuable) or related cases, we believe the "sanitization" process is improper.

We will be happy to meet with you or your representatives at a mutually convenient date to attempt to resolve, short of litigation, the matters noted above. We are particularly concerned with the failure to provide essential underlying documentation. For example, one of the memoranda which we have been provided contains the following statement:

> "The appeal is denied essentially for the reasons stated in the Regional Director's letter of March 31, 1971. The investigation disclosed that the Union reopened the existing agreement with the Association for multi-employer negotiations by individual letters to each of the signatories dated December 27, 1970 and that these negotiations did not begin until on or about February 3, 1971. It further disclosed that on January 4, 1971, the Union received a letter from the Company which expressed its intention to 'negotiate the new Union contract to become effective March 1, 1971, separate and apart from the International Steel Fabricators Association'."

This memoranda seems to present factual and material issues directly material to the issues involved in Case No. 19-CB-1673. Nevertheless, without knowing the content of the contract between the Association and the Union, the Regional Director's letter of March 31, 1971, and the individual letters dated December 27, 1970, the relevance of this particular memoranda remains speculative insofar as providing us with a full and complete basis of the reasons for denial of the appeal.

Our case presents novel and complex questions dealing with, when "actual bargaining" begins, bargaining stability and freedom to contract and withdrawal from multi-employer bargaining. The above abstracted memoranda and its underlying documentation, for example, could be instrumental in determining how we prepare for trial. We need to know the contents of underlying documents referred to in the memoranda in order to compare them with the facts of our case, and determine what evidence we would hope to produce at trial. It is the absence of

Board or court precedent concerning the novel and complex questions to be raised at trial that will necessarily require both the Trial Examiner and the Board to reexamine, in light of the novel facts of our case, the underlying rationale of certain related Board decisions. The existence or nonexistence of certain facts contained in the underlying documents of requested memoranda, we believe, will serve to fully explain the underlying rationale of these prior related Board decisions.

Thus far, we have closely followed our projected time schedule and are now at a critical state of our investigation of those materials which you have made available. However, before we can make any effective analysis of the numerous documents involved, we must be supplied with the underlying documents in each instance where we have requested the same. If the Board disputes our right to such documents, then this matter must be immediately ascertained so that we may proceed accordingly.

When all the requested information has been made available to us, it is estimated that we would need approximately two weeks in order to fully inspect and analyze that information, and an additional two to three weeks to obtain witnesses and prepare a trial brief. For example, if the underlying documents and other requested materials as yet not received were made available to us by the end of next week, I would estimate that we could conclude our investigation and analysis of all the information and be ready for trial by the end of June. This is in accord with our original estimate and request for extension of time.

Very truly yours,

/s/ K. Bruce Stickler
K. BRUCE STICKLER
for Lederer, Fox and Grove

KBS/cl

[Caption omitted in Printing]

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND STAY OF PROCEEDINGS

Plaintiff Sears, Roebuck and Co., upon the attached affidavit and exhibits, moves this Court for a preliminary injunction ordering and directing Defendants to furnish forthwith the documents described in Plaintiff's Complaint for Declaratory Judgment and Injunction pursuant to the Freedom of Information Act, 5 USC 552, and which Defendants have answered will be voluntarily supplied, or alternatively, that the Court stay and enjoin Defendant National Labor Relations Board from further proceedings in Board Case No. 19-CB-1673, which is now pending before Defendant National Labor Relations Board and is scheduled for hearing on February 23, 1972.

The grounds for this motion as set forth in Plaintiff's Memoranda in Support of Motion for Preliminary Injunction are: (1) the sole ground for seeking the documents as stated in the Complaint was their use in assisting and preparing the action before the National Labor Relations Board; (2) Defendants have agreed to furnish these documents after extended delay in reaching such judgment and in answering the Complaint, but have nonetheless denied effective use of them by refusing to stay or postpone the proceedings before the Board until effective use could be made in preparation of the case before the Board; and (3) the Union, the party charged in the action before the Board, has consented to an extension until April 6, 1972.

Further, as set forth in the Memorandum, Plaintiff asserts that there is a substantial likelihood of success on the merits in view of the fact that Defendants have already agreed to furnish the documents, that refusal to stay the proceedings or to furnish the documents forthwith will cause irreparable injury to Plaintiff by denying effective use of the documents in its action before the Board, that there is no harm to either the Board or the respondent before the Board, since the Union has con-

sented to an extension of time, and that the public interest would be served by providing effective use of public records in the course of Board proceedings.

WHEREFORE, in view of the foregoing, Plaintiff prays that Defendants be ordered and directed to furnish the documents sought in the Complaint forthwith or, in the alternative or upon its failure to do so, that Defendants be ordered and directed to stay further proceedings in Board action 19-CB-1673 until 30 days after final delivery of the documents or conclusion of this action before the Court.

Respectfully submitted,

Alan Raywid
Cole, Zylstra & Raywid
2011 Eye Street, N.W.
Washington, D.C. 20006
Telephone 202/659-9750

Gerard C. Smetana
925 So. Homan Avenue
Chicago, Illinois 60607
Telephone 312/265-5352

Lawrence M. Cohen
Lederer, Fox & Grove
111 West Washington Street
Chicago, Illinois 60602
Telephone 312/641-0200

OF COUNSEL:

COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D.C. 20006

LEDERER, FOX & GROVE
111 West Washington Street
Chicago, Illinois 60602

February 11, 1972

AFFIDAVIT OF GERARD C. SMETANA

I, Gerard C. Smetana, hereby swear, depose and say:

1. At all times material herein, I have been and am now employed as Labor Relations Counsel for Sears, Roebuck & Co. (hereinafter called "Sears" or "Plaintiff") and am one of the attorneys of record in the proceeding now pending before the United States District Court in *Sears, Roebuck & Co., et al v. The National Labor Relations Board, et al*, docketed as Civil Action No. 1571-71.

2. On or about April 9, 1971, Plaintiff filed an unfair labor practice charge with the Regional Director of the Nineteenth Region of The National Labor Relations Board against Retail Clerks Union No. 4, Retails Clerks International Association, AFL-CIO, hereinafter "the union", in Case No. 19-CB-1673, alleging that by various acts and conduct that the union had violated and is violating Section 8(b)(3) of the Labor Act, and seeking issuance of the complaint by the Regional Director, acting for and on behalf of the General Counsel, against said union under Section 10 of said Act.

3. On or about April 23, 1971, the Regional Director referred the charge for disposition to the Advice Branch of the Office of the General Counsel in Washington, D.C. On or about June 10, 1971, and pursuant to mandatory instructions received from the Advice Branch in an *Advice Memoranda*, the Regional Director for the Nineteenth Region informed Plaintiff that he was refusing to issue a complaint with respect to the Unfair Labor Practice charges filed by Plaintiff in Case No. 19-CB-1673. He further notified Plaintiff of its right to seek further review of that determination before the Appeals Section of the Office of the General Counsel in Washington, D.C. pursuant to applicable rules and regulations of the Board. (A copy of the letter is attached and made a part hereof as Exhibit "A".)[1]

4. On or about July 14, 1971, Plaintiff, in order to perfect its right of appeal of the Regional Director's

[1] Exhibits A-Q were originally filed as attachments to the complaint with same identification.

determination in the Office of Appeals and acting under the Freedom of Information Act and in compliance with the applicable board rules, filed a request for information (hereinafter "request") with the Board through Defendant Goslee, who was then the acting General Counsel of the Board. In this request, Plaintiff requested that the Board, in accordance with the Freedom of Information Act, make available for public inspection and/or copying, the *Advice Memoranda* in Case No. 19-CB-1673 as well as other relevant advice and appeals memoranda, and the indices thereof, as more fully described in the request which is attached hereto and made part hereof as Exhibit "B".

5. On or about July 22, 1971, Defendant Goslee, on behalf of the Board, by teletype to Plaintiff, and confirmed by a letter of explanation dated the next day, refused to make available to Plaintiff any of the information sought in its request. (A copy of the teletype and letter are attached hereto and made a part hereof as Exhibits "C" and "D", respectively.)

6. On or about July 29, 1971, Plaintiff filed a renewed request for information (hereinafter "renewed request") with Defendant Goslee in which Plaintiff repeated its request for such information, clarified where necessary its request, and answered each of the reasons Goslee had proffered for denying the request, as more fully described in the renewed request attached hereto and made a part hereof as Exhibit "E".

7. On or about August 4, 1971, Defendant Goslee, by letter to Plaintiff, again refused to make available to Plaintiff any of the information sought in the renewed request. (A copy of that letter is attached hereto and made a part hereof as Exhibit "F".)

8. On or about August 4, 1971, Plaintiff commenced this action on its own behalf, and on behalf of others similarly situated pursuant to the Freedom of Information Act against the Board and its acting General Counsel, Goslee, to compel the disclosure of the information and materials within Defendant's possession which Defendant had denied to Plaintiff.

9. Pending disposition by the Court of said complaint, and in order to comply with the applicable time require-

ments of the Board's rules and regulations, Plaintiff filed under protest its Appeal in Case No. 19-CB-1673 with the Office of Appeals notwithstanding Defendant's refusal to make available to Plaintiff the information sought in its request and renewed request.

10. By letter of August 20, 1971, the Director of the Office of Appeals advised Plaintiff that its Appeal had been sustained and that the matter had been remanded to the Regional Director with instructions to issue an appropriate complaint on its behalf. (A copy of that letter is attached hereto and made a part hereof as Exhibit "G".) Pursuant to the mandatory instructions, the Regional Director did thereafter issue for and on behalf of the General Counsel a complaint against the union and scheduled a hearing on the complaint to commence on November 9, 1971, in Butte, Montana. (A copy of said complaint is attached hereto and made a part hereof as Exhibit "H".) In order to permit the parties sufficient time to attempt to settle the matter, or in lieu thereof, to attempt to reach a factual stipulation and thereby obviate the need for a hearing, the Regional Director did thereafter reschedule the hearing to January 26, 1972, at the same location.

11. Both prior to and following the filing of Plaintiff's amended complaint of October 14, 1971, in the instant proceeding, the undersigned was advised that the new General Counsel of the Board, Peter G. Nash, had ordered a complete review of the past practice and policy of the agency to refuse to disclose or make available the Memoranda and indices requested by Plaintiff and sought to be obtained in the pending litigation. As a result of such representations, Plaintiff stipulated with Defendants' counsel that Defendants' responsive pleading in the instant case could be deferred until December 3, 1971.

12. On November 30, 1971, Defendants' counsel filed a Motion for Extension of Time in which to file a responsive pleading and asserted in support thereof that the new General Counsel had "ordered a review of the refusal to disclose such information and is presently disposed to believe that he will make the information available." In that Motion, Defendants also asserted that

"the General Counsel expects that a complete and final review of the question of whether and how to make such information available will be made by the beginning of January". (A copy of the Motion is attached hereto and made a part hereof as Exhibit "I".) On December 1, 1971, Plaintiff filed its Opposition to the Motion for Extension of Time in which to file responsive pleadings in which Plaintiff noted, *inter alia*, that the hearing in Case No. 19-CB-1673 was then scheduled to commence on January 26, 1972, that the information sought in the present action was "directly relevant to, and could materially aid Plaintiff in preparation for, that case", and that without such information Plaintiff would be significantly hindered in effectively preparing for the hearing. (A copy of Plaintiff's Opposition is attached hereto and made a part hereof as Exhibit "J".) At the hearing on the Motion and Opposition thereto, held on January 21, 1972, the General Counsel's representative advised the Court that the General Counsel would divulge whether such information would be available and the extent thereof at a meeting of the American Bar Association Session on Labor Relations Law to be held on January 27, 1972. As a result of such disclosure, Plaintiff did not vigorously oppose the granting of Defendants' Motion for Extension of Time and the Court granted such extension to February 3, 1972. Plaintiff's counsel did, however, advise Defendants' counsel that assuming that such information was made available and depending on the nature and extent of the information, that Plaintiff might be required to seek a further extension in Case No. 19-CB-1673 so as to permit Plaintiff to have a full opportunity to review the data supplied in advance of the rescheduled February 23, 1972 hearing date. Plaintiff's counsel mailed a letter to Defendants' counsel dated January 21, 1972, confirming the events of that day and a copy of said letter is attached hereto and made a part hereof as Exhibit "K".

13. At the scheduled meeting on January 27, 1972, the General Counsel's representative disclosed that General Counsel Nash had decided to make a significant portion of the information sought in the instant case available

to Plaintiff and to the public generally. Following the disclosure of such policy change, one of Plaintiff's counsel in Case No. 19-CB-1673 filed a request with the Regional Director of Region 19 of the Board pursuant to applicable Board rules and regulations requesting that the hearing in Case No. 19-CB-1673 be postponed until one month after Plaintiff had been provided access to the information which the General Counsel had now consented to disclose. A copy of this letter which was mailed on or about February 3, 1972, is attached hereto and made a part hereto as Exhibit "L". On the same date, the undersigned wrote to the General Counsel setting forth the reasons why such information is directly relevant to and necessary to Plaintiff's presentation and preparation in Case No. 19-CB-1673 scheduled to commence on February 23, 1972, in Butte, Montana. (A copy of said letter is attached hereto and made a part hereof as Exhibit "M".)

14. On or about February 3, 1972, the undersigned met with John Irvin, Associate General Counsel, and several other of Defendant's staff representatives, to discuss the necessity of the continuance of the hearing in Case No. 19-CB-1673 based upon the unavailability of a substantial part of the information requested in advance of said date. At that meeting, the undersigned was presented with a copy of the letter sent to one of Plaintiff's counsel in the Board proceeding formally advising Plaintiff of the nature of the information which would be supplied to it and further advising that a substantial portion of such information could not be available until at least three weeks following the time when agency personnel could be assignd to the task of preparing the materials and indices for such materials. (A copy of said letter dated February 3, 1972, is attached hereto and made a part hereof as Exhibit "N".) On the day following said meeting, the undersigned, by letter of February 4, 1972, set forth three additional reasons why the requested continuance should be granted which reasons had been raised during the meeting of February 3, 1972, but which had not been included in the earlier letter to Mr. Nash of February 3, 1972. (A

copy of the February 4, 1972 letter is attached hereto and made part hereof as Exhibit "O".)

15. On February 7, 1972, the undersigned along with Mr. Richard Pincus, one of the attorneys for Plaintiff in the Board proceeding, met with General Counsel Nash at which time Plaintiff again presented the reasons why an extension was warranted in the underlying Board proceeding and the lack of prejudice which would result to any party to such proceeding in the event such limited continuance was granted. Among the reasons noted was the absence of objection by the union's counsel to said continuance and his agreement that the hearing be rescheduled to April 6, 1972 to allow both the Plaintiff and the union sufficient time to examine the memoranda and other materials prior to any hearing in the Board proceeding. The General Counsel was further advised that no prejudice would result to the employees affected by the Board proceeding since Plaintiff voluntarily implemented for its employees all the economic benefits of the Association contract without objection from the union. Defendant Nash was further advised that substantial prejudice would, however, result to Plaintiff since a significant portion of the memoranda and materials which the General Counsel had now agreed to supply admittedly could not be made available in sufficient time to be of use prior to the February 23, 1972 scheduled hearing date. Defendant Nash was further reminded that had he or his predecessor agreed to supply such information when requested in excess of six months ago, there would be no necessity for the current postponement request. On February 8, 1972, Plaintiff's representative wrote to Mr. Nash again reiterating the bases for Plaintiff's request and the compelling reasons why such request was necessary. (A copy of said letter is attached hereto and made a part hereof as Exhibit "P".)

16. By letter of February 8, 1972, Defendant Nash wrote to the undersigned advising that he and the Regional Director had mutually decided to deny Plaintiff's request for a continuance of the hearing from its currently scheduled February 23, 1972 date to 30 days from the date that Plaintiff was supplied with the memoranda

and other materials which the General Counsel now agreed would be made available to Plaintiff. Defendant Nash enclosed with the said letter certain advice memoranda dealing with the subject of withdrawal from multi-employer bargaining units as well as an index to said Advice Branch memoranda. As he acknowledges in said letter, however, said memoranda will have to be retyped because they are not clearly legible in their present form. Additionally, certain other Advice Memoranda in areas related to withdrawals from multi-employer bargaining units are not currently available and according to Mr. Nash's letter, will be supplied at an indefinite date in the future which could extend beyond the February 23, 1972 hearing date. While said letter advises Plaintiff that the appeals memoranda are "available now" for inspection by Plaintiff's representatives, since the Appeals Memoranda have not been maintained according to a subject matter index, Plaintiff's representatives could not possibly complete their examination of the approximately 7,000-8,000 cases involved prior to the scheduled February 23, 1972 hearing date. (A copy of Mr. Nash's letter of February 8, 1972 is attached hereto and made a part hereof as Exhibit "Q".)

17. By letter of February 9, 1972, Plaintiff's representative advised Defendant Nash that Plaintiff would make its own personnel available to assist in retrieving the approximately 7,000 to 8,000 appeals cases which he has now indicated are public information which will be made available to Plaintiff. Plaintiff further advised said Defendant that because of the short notice given Plaintiff to supply such personnel for such task prior to February 16, 1972, and since, according to Defendant Nash's estimate, it will take at least three weeks to complete the review of such Appeals Memoranda, such task clearly cannot be completed prior to the February 23, 1972 hearing date. Moreover, as Plaintiff further advised Defendant Nash in the letter, even if the task could be completed on or before that date, there would clearly be an inadequate time remaining prior to the hearing date to enable Plaintiff to assess such information and make necessary pre-trial preparations in light

of the information obtained. A copy of Plaintiff's aforementioned February 9, 1972 letter is attached hereto and made a part hereof as Exhibit "R".

18. The memoranda and other documents which Defendant Nash has now agreed should be supplied to Plaintiff but which Defendant Nash concedes cannot, because of administrative difficulties, be made available to Plaintiff in sufficient time to be of use prior to the February 23, 1972 hearing date, consist of:

(a) Appeals Section Memoranda for the past five years concerning the application of the Board's *Retail Associates* (120 NLRB 388) rule respecting timely withdrawal from multi-employer bargaining units;

(b) Advice and Appeals Memoranda bearing upon the question of when "actual bargaining" begins, both in the context of withdrawal from multi-employer bargaining as well as in other factual and legal context;

(c) Advice and Appeals Memoranda dealing with the contract successorship doctrine of *Burns International Detective Agency* v. *NLRB*, now pending before the Supreme Court for decision (Sup. Ct. Docket Nos. 71123 and 71198) as well as cases dealing with lockouts occurring in multi-employer bargaining situations.

19. The necessity for the memoranda described in paragraph 18 above is created by the novel and complex questions presented in the underlying Board proceeding in Case No. 19-CB-1673 which have never heretofore been resolved by the Board or the courts in the factual situations therein presented. The resolution of the issues in that case by the Board's trial examiner and the Board will depend upon the application of the Board's *Retail Associates* rule in the novel situation where Sears' withdrawal from a multi-employer bargaining situation occurred prior to the first meeting scheduled for bargaining but subsequent to the preliminary exchange of bargaining proposals between the association and union. The *Retail Associates* rule, as now constituted, permits withdrawals from multi-employer bargaining provided such withdrawal occurs before "actual bargaining" begins. Consequently, the determining factor as to whether or not Sears' withdrawal was timely will necessarily turn on

the question of whether "actual bargaining" begins as of the first scheduled meeting date for bargaining or whether "actual bargaining" begins as of the date preliminary bargaining proposals are exchanged. The novelty of the issues to be litigated is demonstrated by the disagreement between the General Counsel's Advice and Appeals Sections concerning their disposition of the charge in Case No. 19-CB-1673. Moreover, the absence of elucidating Board and court precedent will necessarily require the Board to reexamine, in light of the novel factual situation presented, the underlying rationale of *Retail Associates* and perhaps even require a complete redefinition of the withdrawal standards imposed by that rule. As a consequence, Plaintiff deems it essential to present a full record before the Board's trial examiner and the Board to meet the questions raised in the now to be supplied Advice and Appeals Memoranda and to explore fully all of the important issues presented to assure that the rule which emerges from this landmark case will effectively accommodate certain important and conflicting statutory objectives. To assist us in this task, Plaintiff believes that such Advice and Appeals Memoranda, incorporating administrative determinations never heretofore published or otherwise made available to the public, which have analyzed and considered issues similar or analogous to those to be presented in Case No. 19-CB-1673 will be invaluable. Moreover, since the rule which emerges from 19-CB-1673 will be one of general application, it becomes especially important to Plaintiff to examine and analyze the multitude of factual situations presented in such Advice and Appeals Memoranda so that the impact of the withdrawal standard to be advocated in 19-CB-1673 for application in future cases can be intelligently assessed. Similarly, past Advice and Appeals determinations which require a reconciliation between the Act's policy of encouraging bargaining stability will be equally paramount statutory objective of giving maximum protection to the concept of freedom of contract in bargaining could prove equally invaluable in fully explicating Plaintiff's presentation and arguments in 19-CB-1673, since a similar reconciliation must

be made in that case also. An example of one area which has been the subject of past Advice and Appeals determinations is in the *Burns* type of case involving the issue of whether an employer not a party to a labor contract can be required to be bound by such contract through the Board's "successorship" doctrine. Like *Burns*, the decision in 19-CB-1673 will also require the Board to promulgate a rule which accommodates a party's freedom to make his own bargain through individual negotiations without unduly undermining the goals of bargaining stability sought to be achieved under the limitations imposed by *Retail Associates* on a party's right to withdraw from multi-employer bargaining.

20. Plaintiff believes that no prejudice will result to any party by the granting of Plaintiff's request that a continuance be required from February 23, 1972 until a date 30 days beyond the time when the above described memoranda are made available to Plaintiff's representative. The union Respondent in Case No. 19-CB-1673 has indicated it has no objection to such continuance and is, in fact, agreeable to reschedule the hearing to April 6, 1972. Moreover, the brief delay requested will not prejudice the employees involved in said proceeding since said employees are currently enjoying all of the economic benefits of the recently negotiated association contract which were implemented by Plaintiff without the Union's objection shortly after said contract was executed. In contrast, Plaintiff has been and is being substantially prejudiced by Defendant's refusal to grant such continuance since, through no fault of Plaintiff, a substantial portion of the memoranda which Plaintiff deems essential to its preparation for hearing cannot be sup-

plied in sufficient time to be of any use prior to the currently scheduled hearing date.

/s/ Gerard C. Smetana

Subscribed and sworn before me this 10th day of February, 1972.

/s/ Constance C. Fath
Notary Public

My Commission Expires December 14, 1976.

NOTE: Exhibits "A" through "H" to the Affidavit of Gerard C. Smetana are duplicates of documents printed at pp. 12-37 *supra*, as Exhibits "A" through "D" and "F" through "I" to Amended Complaint. Exhibit "N" to the Affidavit is a duplicate of the document printed at pp. 42-44 *supra* as Exhibit 1 to Defendants' Answer. Exhibit "P" to the Affidavit was not designated for reprinting in this appendix.

EXHIBIT "I"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1571-71

SEARS, ROEBUCK & CO., on its own behalf and on behalf of other charging parties under the National Labor Relations Act, PLAINTIFF

v.

NATIONAL LABOR RELATIONS BOARD AND EUGENE G. GOSLEE, Acting General Counsel, in his own behalf and as agent for the NATIONAL LABOR RELATIONS BOARD, DEFENDANTS

MOTION FOR EXTENSION OF TIME IN WHICH TO FILE A RESPONSIVE PLEADING

The General Counsel of the National Labor Relations Board, by the Assistant General Counsel, hereby requests that this Court extend the time for the filing of defendants' responsive pleading in this case from December 4, 1971, to and including February 3, 1972. In support thereof the Board shows as follows:

1) The Amended Complaint was filed on October 14, 1971; the Board's responsive pleading is presently due December 3, 1971, by stipulation of the parties.

2) The Amended Complaint seeks information pursuant to the Freedom of Information Act, 5 U.S.C. Sec. 552, which defendant Goslee, then Acting General Counsel, denied to the plaintiffs. The Amended Complaint asserts that several categories of materials contained in the files of the General Counsel's Office of Appeals and Advice Branch must be maintained and disclosed under the Information Act, and seeks disclosure of certain materials in those categories.

3) Peter G. Nash is now General Counsel of the National Labor Relations Board and has ordered a review

of the refusal to disclose such information and is presently disposed to believe that he will make the information available.

4) The General Counsel expects that a complete and final review of the question of whether and how to make such information available will be made by the beginning of January.

5) A decision by the General Counsel that such information can and should be made available would obviate the need for the instant suit, or at least simplify it. Therefore, postponing further pleadings pending such decision would conserve the time of the Court as well as the parties.

6) Counsel for the plaintiff has advised that he opposes this motion.

WHEREFORE, the General Counsel of the National Labor Relations Board respectfully requests that this motion for extension be granted and that the time for filing its responsive pleading to the Amended Complaint be extended to February 3, 1972.

Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

By /s/ Glen M. Bendixsen
GLEN M. BENDIXSEN
Chief of Special Litigation
Washington, D.C. 20570
Telephone: (202) 382-5401

Co-Counsel: Charles N. Steele
(Ext. 6164)

Janet Morris
(Ext. 4087)

Dated at Washington, D.C. this 30th day of November 1971.

EXHIBIT "J"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1571-71

SEARS, ROEBUCK & CO., on its own behalf and on behalf of other charging parties under the National Labor Relations Act, PLAINTIFF

v.

NATIONAL LABOR RELATIONS BOARD AND EUGENE G. GOSLEE, Acting General Counsel, on his own behalf and as agent for the NATIONAL LABOR RELATIONS BOARD, 1717 Pennsylvania Avenue, N.W. Washington, D.C. 393-311, DEFENDANTS

OPPOSITION TO MOTION FOR EXTENSION OF TIME IN WHICH TO FILE RESPONSIVE PLEADING

SEARS, ROEBUCK AND CO., by its attorneys, hereby opposes the Motion of the National Labor Relations Board for an extension of sixty days, to and including February 3, 1972, in which to file its answer in the captioned action. In support whereof, the following is shown:

1. This action was commenced on August 4, 1971 by Plaintiff Sears, Roebuck and Co. on behalf of itself and others similarly situated to compel the disclosure of certain materials within the possession of the National Labor Relations Board and to permanently enjoin Defendants from continuing to abridge the rights of Plaintiff and the class it represents by refusing to supply Advice and Appeals Memoranda and indices thereof as requested in Plaintiff's Request and Renewed Request.

2. Defendants have, to date, been afforded 120 days within which to file an answer. The Board now requests an additional extension of 60 days in which to file its answer on the grounds that review of the Board's re-

fusal to disclose the requested information is presently under way, and that the Board is disposed to believe that such information will ultimately be provided.

3. Plaintiff appreciates that the Board's decision whether to release the sought information is a matter of substantial importance to the agency and that its decision is a difficult one which must, therefore, receive the Board's full and careful consideration. In recognition of this factor, Plaintiff has refrained, and will cooperate with Defendants by continuing to refrain, from commencing discovery or other such procedures. The amicable resolution of this matter is in the interest of all of the parties, and the Court. Plaintiff must, however, oppose the Board's motion for the following reasons.

4. Plaintiff is a participant in Retail Clerks Union, Local No. 4, Retail Clerks International Assoc., AFL-CIO, and Sears, Roebuck and Co., NLRB Case No. 19-CB-1673, which is scheduled for trial on January 26, 1972. The information sought in the present action is directly relevant to, and could materially aid Plaintiff in preparation for, that case.[1] The Board's request for an extension of time of sixty days in which to file its answer, to and including February 3, 1972, would not only delay the timely advance of this action, but could also hinder Plaintiff in effectively preparing for the aforementioned case.

5. Filing of a responsive pleading by Defendants in the instant action requires no present attention by the Court and would not, therefore, expend the resources of the Court. Even if the Board does subsequently furnish the information sought by Plaintiff and the class it represents, no significant amount of resources of the parties or the Court will have been wasted by the earlier filing of Defendants' answer. But, should the Board ultimately decide not to make the information available, in whole

---

[1] The relevance of the information sought in this action has recently been recognized by the District of Columbia Circuit. *See NLRB* v. *Julius Getman and Steven P. Goldman*, No. 71-1097 (D.C. 1971); *Sterling Drug Inc.* v. *FTC*, No. 24,878 (D.C. Cir., decided October 15, 1971); *Patsy T. Mink* v. *Environmental Protection Agency*, No. 71-1708 (D.C. Cir., decided October 15, 1971).

or in part, this action will have been further delayed by the withholding of Defendants' answer pending the Board's decision.

6. Plaintiff is in agreement with Defendants that, pending the Board's decision whether to make the requested information available, the parties should not cause the Court to unnecessarily commit its time and attention to this action. However, the filing of Defendants' responsive pleading should not have such an effect, should not delay the Board in reaching its final decision, but would permit this action to advance in an orderly fashion.

WHEREFORE, for the foregoing reasons, the Board's Motion for Extension of Time should be denied.

Respectfully submitted,

Alan Raywid
Cole, Zylstra & Raywid
2011 Eye Street, N.W.
Washington, D.C. 20006
Telephone 202/659-9750

Gerard C. Smetana
925 So. Homan Avenue
Chicago, Illinois 60607
Telephone 312/265-5352

Lawrence M. Cohen
Lederer, Fox & Grove
111 West Washington Street
Chicago, Illinois 60602
Telephone 312/641-0200

Of Counsel:

Cole, Zylstra & Raywid
2011 Eye Street, N.W.
Washington, D.C. 20006
Telephone 202/659-9750

Lederer, Fox & Grove
111 West Washington Street
Chicago, Illinois 60602
Telephone 312/641-0200

Dated: December 1, 1971

EXHIBIT "K"

LEDERER, FOX AND GROVE
Attorneys at Law
Chicago Title and Trust Building
111 West Washington Street
Chicago, Illinois 60602

Philip C. Lederer
Shayle P. Fox
Kalvin M. Grove
Lawrence M. Cohen

S. Richard Pincus
Herbert M. Berman
Russell M. Kofoed
K. Bruce Stickler
David L. Evans
Jeffrey S. Goldman

Area Code 312
Telephone 641-0200

January 21, 1972

Mr. Charles N. Steele
Division of Litigation
National Labor Relations Board
1717 Pennsylvania Avenue N.W.
Washington, D.C. 20570

Re: *Sears, Roebuck and Co.* v. *National Labor Relations Board*
United States District Court
For The District of Columbia
Civil Action No. 1571-71

Dear Mr. Steele:

We are pleased to learn today that the General Counsel is contemplating making available at least some of the information we have sought in the above-captioned case, and that such information will be made available at the time of the forth-coming meeting of the American Bar Association's Section on Labor Relations Law. For this reason, as you know, we did not vigorously oppose today the granting of your motion for an extension of time to file a responsive pleading.

We expect that, once the position of the General Counsel has been announced, you will proceed expeditiously with the instant case insofar as there are any outstanding issues. Moreover, depending on the nature and extent of the information that will be made available, we may be required, as we indicated today, to seek a further extension in Case No. 19-CB-1673 so that we will have an opportunity to fully review the data supplied.

Very truly yours,

Lawrence M. Cohen
For Lederer, Fox and Grove

LMC:hy

EXHIBIT "L"

LEDERER, FOX AND GROVE
Attorneys at Law
Chicago Title and Trust Building
111 West Washington Street
Chicago, Illinois 60602

Philip C. Lederer
Shayle P. Fox
Kalvin M. Grove
Lawrence M. Cohen

S. Richard Pincus
Herbert M. Berman
Russell M. Kofoed
K. Bruce Stickler
David L. Evans
Jeffrey S. Goldman

Area Code 312
Telephone 641-0200

February 1, 1972

Mr. Charles M. Henderson
Regional Director
National Labor Relations Board, Region 19
1000 Republic Building
1511 Third Avenue
Seattle, Washington 98101

Re: *Retail Clerks Union, Local No. 4 Retail Clerks International Association, AFL-CIO and Sears, Roebuck and Co.*—Case No. 19-CB-1673

Dear Mr. Henderson:

On behalf of Sears, Roebuck and Co., the charging party in the above-captioned case, we hereby request, pursuant to Section 102.16 of the Board's Rules and Regulations, that the hearing date herein be rescheduled from February 23, 1972 to the date described below.

This request is based solely on the necessity that Sears have, in order to prepare for the hearing in the instant case, the information which it has sought from the Board in *Sears, Roebuck and Co. v. National Labor Re-*

lations Board, Civil Action 1571-71 (D.D.C.). General Counsel Nash recently advised the American Bar Association's Section on Labor Relations Law that significant portions of such information would now be made available. For the reasons set forth in the attached letter to Mr. Nash, it is apparent that such information is directly relevant to and could materially aid Sears in preparation for the trial of the instant case.

In view of the imminent disclosure of information relating hereto, which Sears has previously sought unsuccessfully to obtain over an extended period of time, we request that the present hearing be continued until one month after Sears has been provided access to the material described in the attached letter to Mr. Nash. The availability of such information prior to trial is critical, we believe, in facilitating the meaningful disposition of this matter.

A copy of this request is being sent to counsel for the Respondent and counsel for the General Counsel.

Very truly yours,

/s/ S. Richard Pincus
S. Richard Pincus
For Lederer, Fox and Grove
Attorneys for Sears, Roebuck and Co.

SRP:hy
Enclosure

cc Mr. Ralph Wilmot
Regional Attorney
National Labor Relations Board
Region 19

Mr. Irwin H. Socoloff
Attorney for Retail Clerks Union,
Local No. 4
1775 K Street, N.W.
Washington, D.C. 20006

EXHIBIT "M"

LEDERER, FOX AND GROVE
Attorneys at Law
Chicago Title and Trust Building
111 West Washington Street
Chicago, Illinois 60602

Philip C. Lederer
Shayle P. Fox
Kalvin M. Grove
Lawrence M. Cohen

S. Richard Pincus
Herbert M. Berman
Russell M. Kofoed
K. Bruce Stickler
David L. Evans
Jeffrey S. Goldman

Area Code 312
Telephone 641-0200

February 3, 1972

Peter Nash, Esquire
General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue
Washington, D.C.

Re: Sears, Roebuck and Co. v.
National Labor Relations Board
United States District Court
For the District of Columbia
Civil Action No. 1571-71

Dear Mr. Nash:

We were most happy to learn that your office is considering making available certain indices and memoranda of advice and appeals determinations which, in the past, have been witheld from public disclosure. Specifically, we understand from disclosures made at the ABA Practice and Procedures Committee that you contemplate making the information available on the following basis:

1) All advice memoranda issued since August 1, 1971;

2) Appeal memoranda issued since August 1, 1971 sustaining the Regional Director's dismissal of a charge; and
3) An index of such memoranda for all such cases decided since August 1, 1971.

While such information is extremely helpful to the Bar generally we believe our litigation is *sui-generis*, and our need for additional information will not set adverse precedent.

First, you will not create a precedent for delay by giving Plaintiff access to such information for cases decided prior to August 1, 1971 in as much as Plaintiff's request was initiated on July 14, 1971, over six months ago. Information preceding the August 1, 1971 cut-off date is essential to Plaintiff's preparation of its case in the underlying proceeding in Case No. 19-CB-1673.

Second, the necessity for the indices, memoranda, etc. described in our July 14 and July 29, 1971 letters to you for the five year period preceding such request is created by the novel and complex questions presented in 19-CB-1673 which have never heretofore been resolved by the Board or the courts in the factual situation presented therein. As you know, 19-CB-1673 concerns the application of the Board's *Retail Associates* (120 NLRB 388) in a novel situation where Sears' withdrawal occurred following a preliminary exchange of proposals but prior to the first meeting for bargaining. The absence of elucidating Board and court precedent will necessarily require both the Trial Examiner and the Board to reexamine, in the light of these novel facts, the underlying rationale of *Retail Associates* and, perhaps require a complete redefination of the withdrawal standards imposed by that rule. As a consequence, it is essential that the charging party and the General Counsel's representative present relevant testimony to meet the questions raised in the sought after Advice and Appeals Memoranda at the hearing and in their briefs, and to explore fully all facets of the important issues presented to assure that the rule which emerges from this case will effectively accomodate certain important and conflicting

statutory objectives. To assist us in this important goal, we belive that advice and appeal memoranda and the indices to such administrative determinations over the past five years involving questions similar and analogous to those presented in 19-CB-1673 could be invaluable. While we recognize that such administrative determinations could not be utilized as binding precedent on the Board or the courts, the memoranda will nonetheless reflect a thorough examination and analysis of the very same questions and considerations involved in 19-CB-1673 which the best minds on the General Counsel's staff have considered to be pertinent in deciding such cases. Moreover, since the rule which results from 19-CB-1673 will be one of general application, it becomes especially important to examine and analyze the multitude of factual contexts presented in such administrative memoranda so that the impact of the withdrawal standards or rules to be advocated in 19-CB-1673 for future application can be intelligently assessed. By way of illustration, memoranda bearing upon the question of when "actual bargaining" begins both in the context of withdrawal from multi-employer bargaining as well as in other factual and legal situations would be especially pertinent.

Likewise, past advice and appeals determinations which required a reconciliation between the Act's policy of encouraging bargaining stability with its equally paramount objective of giving maximum protection to the concept of freedom of contract in bargaining will prove equally invaluable in fully explicating our position in 19-CB-1673, since a similar reconciliation must also be made there. An example of one such area is presented by *Burns International Detective Agency* v. *NLRB*, now pending before the Supreme Court for decision, (Supreme Court docket nos. 71123 and 71198) involving the question of whether an employer can be bound by a contract not of his own making. Like *Burns*, the decision in 19-CB-1673 will also require the Board to enunciate a rule which accommodates a party's freedom to make his own bargain through individual negotiations without unduly undermining the goal of bargaining stability sought to be achieved under the limitations imposed by *Retail*

Associates on a party's right to withdraw from multi-employer bargaining. For example, in *Burns* it was asserted that the failure to impose a bargaining agreement on a non-party thereto would result in major industrial strife. This is one of the areas which may be present or have been analyzed in advice memoranda that were issued at the time when it was mandatory for the regions to submit *Burns* type cases. Certainly these considerations have equal relevance in determining whether to impose a contract in the context of permissible withdrawals from multi-employer bargaining units. Since the Advice and Appeals sections have, in the past, had occasion to consider numerous *Retail Associate's* and *Burns'* type cases, and since each relates to a readily identifiable and well-defined area, and are, according to Mr. Goslee's letter of July 23, 1971 "collected and filed according to the issues raised in each case", should be made available without much inconvenience.

Pending your decision on the foregoing request and in view of the fact that we have not yet been given access to the information we have requested, and further, that we need such information to prepare appropriate witnesses for the hearing in 19-CB-1673, now scheduled to commence on February 23, 1972, to keep delay to a minimum, we would be prepared to immediately start examining whichever material you deem appropriate at this time.

We are enclosing a copy of a letter to Regional Director Henderson, formally requesting an extension of the hearing date from February 23, 1972 to 30 days from the date the information requested herein is made available to us.

We would like to reiterate that should such extension of time be granted, it would not be setting a precedent. This case is surely *sui-generis*—for had our request been honored when made, as you would no doubt do under your new proposed policy change, we would have had more than ample time to study such advice and appeal memoranda since our initial request in July, 1971.

We would be most happy to examine such documents at your convenience and pay for the cost of any duplicating that may be necessary.

Thank you for your cooperation.

Sincerely,

/s/ Lawrence M. Cohen
Lawrence M. Cohen

/s/ Gerald C. Smetana
Gerald C. Smetana

/s/ Alan Raywid
Alan Raywid

Enclosure

cc: John Irving, Esquire
Mr. Charles M. Henderson

EXHIBIT "O"

SEARS, ROEBUCK AND CO.
1211 Connecticut Avenue
Washington, D.C. 20036

Area Code 202
223-5840

February 4, 1972

John Irving, Esquire
Associate General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C.

Re: Sears, Roebuck and Co. v. National Labor Relations Board, United States District Court for the District of Columbia, Civil Action No. 1571-71 and Retail Clerks Union, Local 4, Retail Clerks International Association, AFL-CIO and Sears, Roebuck and Co., Case No. 19-CB-1673

Dear Mr. Irving:

We want to thank you for the opportunity of being able to make an oral presentation to you and your staff in support of our letter of February 3 to Peter Nash.

Please consider this letter as supplemental to our request for an extension of time in the Butte Case, 19-CB-1673. There were three further matters that we raised during the oral discussion that we had not included in our letter as grounds for the granting of a continuance and why granting of such request in this case would not be precedential:

1) Our cooperation with the General Counsel's office in granting extensions of time in the Freedom of Information case to permit the General Counsel to formulate these new policies and opposing in form only the General Counsel's last request for an extension so that the policy change could initially be discussed at the mid-winter meeting of the American Bar Association's special committee dealing with the subject. As a result of

the charging parties' gentlemanly dealing with the Freedom of Information litigation, the General Counsel has had since August of 1971 to file a responsive pleading.

2) Your letter of February 3 to Mr. Cohen indicates that some of the material which we seek will not be available for approximately three weeks which appears to coincide with the presently scheduled February 23 hearing date. Accordingly, along with the reasons we set forth in our letter of February 3, including why we need this material to prepare witnesses prior to the Board hearing, it would now appear to us that an appropriate date would be one month from February 23.

As we indicated at our meeting, we would be prepared at the earliest possible time to examine the index that you would make available so that we can limit the areas of our inquiry. At this time, the areas that appear to be relevant are cases dealing with withdrawal from multi-employer bargaining situations, successorship cases such as *Burns* and lock-out cases occurring in multi-employer bargaining situations.

3) As further evidence of our attempt not to delay these proceedings, we have promptly made the request for this additional time so as not to even miss one day, we have promptly commenced and cooperated with the Counsel for the General Counsel in 19-CB-1673 in making arrangements for the preparation of the case and have scheduled further preparations with the Counsel for the General Counsel, which commitments will be honored.

Accordingly, we respectfully urge that one month's extension from February 23, 1972 be granted.

Sincerely,

/s/ Gerald C. Smetana
Gerald C. Smetana

cc: Mr. Nash
Mr. Henderson

EXHIBIT "Q"

[Logo]

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570 February 8, 1972

Re: Retail Clerks Union, Local 4, Retail Clerks International Association, AFL-CIO and Sears, Roebuck and Co., Case No. 19-CB-1673

Mr. Gerald C. Smetana
Sears Roebuck and Company
1211 Connecticut Avenue
Washington, D.C. 20036

Dear Mr. Smetana:

This will acknowledge receipt of your letters of February 3 and 4, 1972, and confirm our conversation in my office on February 7, 1972, concerning the Company's request for a postponement of the subject unfair labor practice hearing.

I have given careful consideration to your request for postponement, have had this matter discussed with the Regional Director and we have decided that your request must be denied. In doing so, I am cognizant of the fact that the union has raised no objections to this extension and of your argument that this extension is necessitated by a desire to review all of the documents which this Office is supplying to you pursuant to your requests under the Freedom of Information Act. In my letter to you of February 3, 1972, I advised you that the memoranda which you requested under the Freedom of Information Act would be forthcoming but noted that I did not consider this material to be of precedential value. It is my intention to provide the public with as much information as possible concerning the decisions of the General Counsel because I believe that such knowledge will greatly benefit the operations of the Agency and assist it in

achieving its goals. I will not, however, permit my decision to provide this information to stand in the way of timely resolution of unfair labor charges pending before the Agency.

The information you request concerning Advice memoranda dealing with the subject of withdrawal from multiemployer bargaining units and the index to the Advice Branch memoranda are available for you and are transmitted herewith. Inasmuch as these copies appear difficult to read, I will have them retyped if you find this necessary. However, I am sure that you will want these as quickly as possible so I am transmitting them at this time.

Appeals memoranda are available to you under the guidelines described in my letter to you of February 3, 1972. Pursuant to our discussion yesterday and because these memoranda are not indexed by subject matter, we will make the memoranda available to your representative who can then review them to determine which he wishes to copy. These documents are available now and we await your decision with respect to them. Procedures for this inspection can be worked out when we are advised of your decision. In the meantime we are preparing to send to you the Appeals memoranda, if any, in those cases which were the subject of the enclosed Advice memoranda. Your request for the memoranda in cases dealing with the *Burns* doctrine and lockouts made last week will be supplied to you as soon as possible.

Very truly yours,

Peter G. Nash
General Counsel

Enclosures

EXHIBIT "R"

LEDERER, FOX AND GROVE
Attorneys at Law
Chicago Title and Trust Building
111 West Washington Street
Chicago, Illinois 60602

Philip C. Lederer
Shayle P. Fox
Kalvin M. Grove
Lawrence M. Cohen

S. Richard Pincus
Herbert M. Berman
Russell M. Kofoed
K. Bruce Stickler
David L. Evans
Jeffrey S. Goldman

Area Code 312
Telephone 641-0200

February 9, 1972

Peter Nash, Esquire
General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C.

Re: Sears, Roebuck and Co. v. National Labor Relations Board, Civil Action No. 1571-71 (D.C.D.C.), Board Case No. 19-CB-1673

Dear Mr. Nash:

This will acknowledge receipt of your letter of February 8, 1972, denying our postponement request in Case No. 19-CB-1673, as well as the enclosures submitted therewith, which consist of copies of the Advice Index and the sanitized version of Advice memoranda dealing with the subject of withdrawals from multi-employer bargaining units. We understand that the additional Advice memoranda dealing with the *Burns* doctrine and lockouts, which was encompassed within our initial re-

quest of July 14, 1971, are not currently available and will not be available until an indefinite future date.

With respect to the materials sent, we note that they are not identical copies of the Advice memoranda requested, but they are instead, a sanitized version thereof from which you have deleted the names of the parties as well as the names of other Advice memoranda upon which reliance is placed by the Advice Section in making its disposition of the case. As you know, we have consistently taken the position in the Court proceeding that the entirety of the Advice and Appeals memoranda are required to be supplied in accordance with the provisions of the Freedom of Information Act, and our receipt of such memoranda in their diluted form should not be construed as a waiver by Plaintiff of that position. Additionally, most of the Advice memoranda supplied are, as you acknowledge, difficult to read and we therefore accept your suggestion that they be retyped by your office and resubmitted to us in more readable form.

In accordance with our letter of February 8, 1972, we again offer to make our own personnel available to assist in retrieving the approximately 7,000 to 8,000 appeals cases which you now indicate will be made available to us. Because of the short notice given, we will be unable to supply such personnel for this task prior to February 16, 1972. We are advising you of this decision now so that you can determine the procedures which will be applicable to our representatives in their review of such appeals memoranda or other documents. According to your latest estimate, it will take at least three weeks to complete the review of such memoranda, and it therefore seems apparent that the task cannot be completed prior to the February 23, 1972 hearing date. Even if it could be completed on or before that date, there would obviously be inadequate time left to enable us to assess such information and make our necessary pre-trial preparations in light of the information obtained. Notwithstanding this, however, we stand ready to begin the retrieval task on February 16, 1972 and, unless advised to the contrary, shall have a representative

resent at Mr. Herman's office to begin the necessary eview.

Very truly yours,

/s/ S. Richard Pincus
S. Richard Pincus
For Lederer, Fox & Grove

AFFIDAVIT

I, JEFFREY S. GOLDMAN, swear and affirm that:

1. I am an attorney-at-law with the law firm of Lederer, Fox & Grove of Chicago, Illinois, and, since February 16, 1972, have been conducting a review of the General Counsel's memoranda of appeals decisions issued by the Appeals Section of the General Counsel of the N.L.R.B. on behalf of my client, Sears, Roebuck and Co.

2. On February 16, 1972, the General Counsel of the N.L.R.B. permitted me access to the memoranda of these decisions for the first time.

3. Since that date, I have worked in the offices of the National Labor Relations Board at 1717 Pennsylvania Avenue, Washington, D.C., in accord with the directives of the representatives of the General Counsel, to wit:

A. I have examined the decisions without disturbing their original order.

B. I have conducted the review without making any written notes on substantive matters.

C. I have avoided, as requested, unessential conversations with Board personnel while within the Board offices.

4. My purpose in conducting a review of these Memoranda was to locate decisions relevant to a novel and complex issue presented in Board Case No. 19-CB-1673, which has never heretofore been resolved by the Board or the courts in the factual situation presented therein. Since the questions in Case No. 19-CB-1673 are whether the withdrawal by Sears from a multi-employer bargaining unit was timely, and whether Sears can be bound to an agreement it did not negotiate, I have sought decisions which cast light upon the appropriate standard for withdrawals, upon a definition of "actual bargaining", and upon standards required to bind a party to a collective bargaining agreement which it has not negotiated.

5. Being advised by the General Counsel that no index exists, I must analyze approximately 8,000 memoranda on a case by case basis. To date, I have examined ap-

proximately 2,500 of these memoranda, from which I have been able to distill 80 that I have requested be reproduced at the expense of my client. At this rate of progress, seven additional weeks will be required to complete this review.

6. Of the 2,500 decisions examined to date, the Appeals Section denied 90-95% of these appeals, terminating all further proceedings.

7. These memoranda are not complete decisions. The overwhelming majority of these memoranda explicitly rely upon the "circumstances of the case" which without exception remain unstated. Not infrequently these decisions incorporate by reference, and rely upon, provisions in other documents such as collective bargaining agreements, or settlement agreements, without describing the language or effect of the pertinent provisions. None of the cases indicate the rationale of either the Regional Director's decision from which the appeals are taken, or the arguments of the parties to which the Appeals Section is responding.

8. Being unable to abstract the meaning of these memoranda because of these techniques of omission and incorporation by reference, I orally requested the materials which complete these decisions.

9. Pending a decision on this request by the General Counsel, each case requiring additional documentation was designated, and the original oral request was renewed.

10. On February 29, 1972, a representative of the General Counsel denied my request for access to any additional material.

11. On March 1, 1972, I formally requested by letter, the underlying non-confidential documents: (1) the Regional Director's decision from which the designated appeals were taken; (2) the statements of position submitted by the parties to the Appeals Section; and (3) the pertinent evidentiary documents, e.g., collective bargaining agreements. I offered to specify which materials in the designated cases were needed when I was again given access to the designated cases, which theretofore had been read without making notes, as requested.

12. On March 3, 1972, the representative of the General Counsel orally denied all my requests made in the letter of March 1, and confirmed this denial in a letter on March 7, 1972.

/s/ Jeffrey S. Goldman
Jeffrey S. Goldman

Subscribed an sworn to before me this 10th day of March, 1972.

/s/ Constance C. Fath
Notary Public

My commission expires December 14, 1976.

[Caption omitted in Printing]

STATEMENT OF GENUINE ISSUES

The General Counsel of the National Labor Relations Board pursuant to Rule 9(h) of this Court files this Statement of Genuine Issues on the grounds that plaintiff's Statement of Material Facts Not In Dispute incorrectly states as fact certain legal conclusions and omits some material facts.

1) The Advice Branch is not empowered and does not issue instructions to the Regional Directors, contrary to plaintiff's Statement of Material Fact No. 6 (Hereafter Statement).

2) The Appeals Memoranda are not incomplete (contrary to Statement, No. 8) but contain all material originally placed in them, except stated deletions which are explained. When memoranda refer to the "circumstances of the case," reference is made not to extraneous documents, but to materials in the investigatory files of such cases.

Additionally, the General Counsel says that the following are additional statement of material facts not in dispute:

3) Only the Regional Directors have been delegated the General Counsel's power to issue complaints. The Advice Branch cannot order, or instruct the Regional Director to order, issuance of complaint.

4) Advice memoranda are not cited as precedent in any agency decisions.

5) Appeals memoranda ("minutes") have never been indexed by subject matter, but have been indexed solely by case number.

6) Appeals minutes are not cited as precedent in any agency decisions.

7) Appeals minutes were prepared in all cases before April 1971. Since then Appeals minutes have not been prepared except in major cases where complaint issues.

The General Counsel submits, however, that the above facts are basically not in dispute, and accordingly, do not require trial for their determination.

GLEN M. BENDIXSEN
Chief of Special Litigation
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20570
Telephone: (202) 254-9221

Dated at Washington, D.C. this 7th day of June, 1972.

[Caption omitted in Printing]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff hereby moves the Court to enter summary judgment in its favor, in accordance with the provisions of Rule 56(a) and (c) of the Rules of Civil Procedure, on the ground that the pleadings, affidavits, statement of material facts as to which there is no genuine issue, and exhibits attached thereto show that Plaintiff is entitled to judgment as a matter of law.

Gerard C. Smetana
925 South Homan Avenue
Chicago, Illinois 60607

Alan Raywid
Cole, Zylstra & Raywid
2011 Eye Street, N.W.
Washington, D.C. 20006

Lawrence M. Cohen
Lederer, Fox & Grove
111 West Washington Street
Chicago, Illinois 60602
Attorneys for Plaintiff

Of Counsel:

Cole, Zylstra & Raywid
2011 Eye Street, N.W.
Washington, D.C. 20006

Lederer, Fox & Grove
111 West Washington Street
Chicago, Illinois 60602

May 23, 1972

[Caption omitted in Printing]

DEFENDANT GENERAL COUNSEL'S CROSS-MOTION FOR SUMMARY JUDGMENT

Defendant General Counsel hereby moves the Court to enter summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the grounds that the pleadings and the statement of material facts as to which there is no genuine issue and the exhibits thereto show that defendant General Counsel is entitled to judgment as a matter of law.

Respectfully submitted,

Marcel Mallet-Prevost
Assistant General Counsel

By /s/ Glen M. Bendixsen
GLEN M. BENDIXSEN
Chief of Special Litigation
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20570
Telephone: (202) 254-9221
Co-counsel: Charles N. Steele
(Ext. 9352)

Dated at Washington, D.C. this 7th day of June, 1972.

[Caption Omitted in Printing]

POINTS AND AUTHORITIES OF DEFENDANT IN OPPOSITION AND IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

STATEMENT OF THE CASE

This case involves plaintiff Sears' complaint under the Freedom of Information Act seeking to require the General Counsel of the National Labor Relations Board to make available certain documents. All of the documents requested are involved in the processing of charges brought before the General Counsel for the exercise of the discretionary authority vested in him by Section 3(d) of the Act to issue or not to issue unfair labor practice complaints. Accordingly, since the process by which the General Counsel makes that decision forms the backbone of the analysis of this case, we have set forth in Section I below a description of the administrative structure of the General Counsel's office for processing unfair labor practice charges. Thereafter, we have set forth the chronology of this case and the unfair labor practice case during which plaintiff Sears sought these materials.[1]

1. The administrative structure of the General Counsel's Office for processing unfair labor practice charges.

The National Labor Relations Act cannot be applied by the Board on its own initative. Thus, as to the unfair labor practice provisions of the Act, the Board can proceed only after a charge has been filed. Furthermore, a "charge . . . is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry."

[1] While agreeing that the case prevents no material facts necessitating trial, the General Counsel contends that the facts as set forth in plaintiff's Statement of Material Facts Not In Dispute omitted certain material facts and set forth as fact certain legal conclusions. Accordingly, we have this day filed a counter-statement of material facts.

N.L.R.B. v. *Fant Milling Co.*, 360 U.S. 301, 307 (1959). Section 3(d) of the Act vests the General Counsel with ". . . final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10 . . ." The initial power to decide whether a complaint should issue on an unfair labor practice charge has been delegated to the Regional Directors. National Labor Relations Board, Organization and Functions, Section 203.1. 32 F.R. 9588. Board Statement of Procedures, Sec. 101.4, 29 C.F.R. Sec. 101.4. Charges are investigated by members of the Regional Office staff. When the evidence uncovered during the investigation convinced the Regional Director that complaint is warranted he issues a complaint. Statements of Procedure, 101.8, Rules and Regulations, Sec. 102.19(a). On the other hand, if the Regional Director concludes that the issuance of a complaint is unwarranted, he dismisses the charge and so informs the parties "together with a simple statement of his reasons therefore." Statements of Procedure, Sec. 101.6.

A Regional Director's decision is automatically appealable to the General Counsel, where the Office of Appeals reviews the entire file of the case and recommends the action to be taken by the General Counsel. Statements of Procedure, Sec. 101.6; Organization and Functions Sec. 201.1.2. The General Counsel either sustains the refusal to proceed on the charges, "stating the grounds of his affirmance," or he orders the Regional Director to take further action, e.g. orders the Regional Director to issue the complaint. Rules and Regulations 102.19(c). See, generally, General Counsel's *Quarterly Report on Case Developments* (July 31, 1968) R-1114, BNA, Labor Relations Yearbook (1968) pp. 294-295. The decision, together with a statement of the legal grounds for the decision it, is sent to the parties in a letter over the General Counsel's signature. Additionally, the Office of Appeals in some cases prepares a memorandum—or "agenda minute"—analyzing various

aspects of the case which is sent to the Regional Director but not to the parties.[2]

In addition to this formal case handling procedure, the General Counsel maintains an Advice Branch which "reviews regional offices' requests for advice and formulates policy on novel or unsettled procedural and substantive matters arising in unfair labor practice cases." NLRB Organization and Functions, Sec. 202.1.1. Thus, when a Regional Director feels he needs aid on issues raised by a case, he submits a memorandum detailing the facts which raise the problem. On certain issues, particularly current ones raising novel problems, the General Counsel requires the Regional Directors to submit cases for consideration. Statements of Procedure 101.8. See, generally, *Quarterly Report on Case Developments* (Jan. 26, 1968), R-1098, BNA, Labor Relations Yearbook (1968), pp. 283-284. The Advice Branch analyses the facts set forth in the request for Advice and prepares an analysis and a recommended approach which it sends to the Regional Director. It may recommend dismissal of charges or issuance of the complaint, or make its advice contingent on the results of further investigation. Frequently, such memoranda suggest settlement of pending cases as a possible and suggest the basis on which a settlement could be accepted. The memorandum also discuss various defenses that may be raised, possible legal and factual answers to such contentions, and, sometimes suggests possible approaches to prosecution of the case. The memorandum is a guide to the Regional Director as to how to handle a particular case. While a Regional Director would only in a rare instances disregard advice received on factual or legal issues submitted to the Advice Branch, the Advice Branch's instructions are not mandatory since the Regional Director is the only person empowered to make the initial decision to issue or refuse

[2] Prior to April, 1971, the Office of Appeals prepared a minute in all cases. Since that date, minutes have generally been prepared only in cases where a decision to issue complaint was reached, and the staff analysis was felt to be important to the Regional Director in his prosecution of the case. Letters are sent to the parties in all cases.

to issue a complaint; the Advice Branch does not have authority to order issuance of complaints. Indeed, the initial determination of a Regional Director that a complaint is not warranted, even when made after consultation with the Advice Branch, is, as shown, subject to direct reversal by the General Counsel on appeal to his Office of Appeals.

* * * *

APPENDIX A

[Logo]

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570 February 27, 1970

Mr. Kenneth Culp Davis
University of Chicago
Law School
1111 East 60th Street
Chicago, Illinois 60637

Dear Professor Davis:

This is in reply to your letter of February 9, 1970, in which you ask whether we "have a compilation of memoranda embodying advice and opinions in individual cases, which are not published in the Quarterly Report."

As your letter correctly points out, there is apparently some confusion as to the precise nature of the operations of the Advice Branch and the Office of Appeals. In order to try to clarify the situation, I am attaching hereto 2 copies of "Quarterly Report on Case Developments" which explain these operations. I shall attempt to elaborate on these explanations.

With respect to the Office of Appeals, the Quarterly Report notes, each case "including statements submitted by any party, is assigned to an attorney and his supervisor. After a detailed review, they prepare a memorandum containing a statement of facts, an analysis of all legal and factual issues involved, and a recommendation for disposition of the appeal." This memorandum merely serves as a basis for staff discussion and does not constitute the final disposition of the case. That disposition, which is ultimately made by the "Appeals Committee," is explained in a letter which is sent to all interested parties. No subject index, compilation, or book of digests of these memoranda and letters is maintained. A copy of each such letter and memorandum is

placed in the individual case file, and cannot thereafter be retrieved, except by reference to the case name and number.

In the Advice Branch, the Quarterly Report notes, "when a case is fully prepared for review, it is then presented, either orally or by written memorandum, to what is termed 'the agenda'." These memoranda, which are prepared solely for use by the "agenda" in considering the case, are not digested, indexed, or in any way compiled according to subject matter. A copy of such memorandum is placed in the file of the case maintained by the Advice Branch and it can only be located by reference to the case name and number. The decision of the "agenda" is usually communicated to the Regional Offices by a further memorandum. This memorandum does not constitute the final disposition of the case, but is in the nature of a guide to the Regional Offices respecting the further handling of the specific case. There is no digest system for these memoranda; however, a set of them is retained by the Advice Branch, classified and filed according to the issues raised in each case, for use by its staff as a research tool. The final disposition of an advice case is reflected in the Regional Director's subsequent action which usually takes the form of issuance of a complaint or a letter explaining his reasons for declining to do so.

I trust that the foregoing helps answer your inquiry.

Sincerely yours,

/s/ Samuel A. Chaitovitz
Samuel A. Chaitovitz
Deputy Assistant General Counsel

cc: Arthur Schiller, Esq.

QUARTERLY REPORT ON CASE DEVELOPMENTS BY NATIONAL LABOR RELATIONS BOARD GENERAL COUNSEL PETER G. NASH (OFFICIAL TEXT)

Quarter Ending March 31, 1972

This Report includes a selection of cases to which I directed my personal attention during the first quarter of this year.

The majority of these cases were considered either as "Advice" cases or "Appeals" cases. "Appeals" cases arise on a charging party's appeal to the Office of Appeals in Washington from a decision by a Regional Director to dismiss a charge for lack of merit. "Advice" cases involve matters referred to the Regional Advice Branch in Washington from the various Regional Offices under guidelines set out at the beginning of this Quarterly Report.

Although this Report is in no sense exhaustive, since the reported cases constitute only a fraction of the cases which I have dealt in this period, its scope is somewhat more expansive than has been the case in the past. This more expansive treatment, along with the inclusion of "Advice Submission Guidelines," is but further evidence of my desire to keep the public advised of how, when, and why I am acting. Such a policy, in my judgment, produces a better informed labor bar and public and affords me the opportunity to receive comments on my action—both assure a better and more responsible National Labor Relations Board.

/s/ Peter G. Nash
Peter G. Nash
General Counsel

I ADVICE SUBMISSION GUIDELINES

The General Counsel's instructions to the Regional Offices of the Board concerning the submission of cases for review in the Regional Advice Branch provide that the Regional Director in each office should submit for advice any case which he finds to involve:

a. New or doubtful legal questions.

b. Region-wide, inter-Regional, or national interest.

c. Matters which may be affected by Titles I-VI of the Labor-Management Reporting and Disclosure Act of 1959.

d. Section 8(f) issues not clearly controlled by existing Board precedents.

e. *Miranda Fuel*, 140 NLRB 181, issues and issues concerning the union's duty of equal representation of all unit employees. *Except* that, in such cases, the Regional Director may dismiss or solicit a withdrawal request if he concludes that the evidence is insufficient to establish that the alleged discrimination, restraint, or coercion was based on any consideration of union membership or activity, or on any other irrelevant, unfair, or invidious consideration.

f. Union "internal" discipline issues not clearly controlled by existing Board precedents.

g. Successorship or "contract assumption" issues not clearly controlled by existing Board precedents.

h. Bargaining obligation issues concerning whether an employer's decision is "essentially financial and managerial in nature" within the meaning of *General Motors Corp.*, 191 NLRB No. 149.

i. Cases raising Section 8(a)(2), 8(a)(5) or 8(b)(3) allegations involving the U.S. Postal Service. However the Region may dismiss such cases which turn essentially on issues of fact and where the evi-

dence disclosed by investigation is clearly insufficient to support the charge.

j. Issues arising under Phase II of the economic stabilization program.

k. Section 8(b)(7) issues not clearly controlled by existing Board precedents.

l. Doubtful issues arising under *Collyer Insulated Wire*, 192 NLRB No. 150. See General Counsel's memorandum of February 28, 1972, concerning Arbitration Deferral Policy Under *Collyer*.

m. Issues arising under *Packinghouse Workers* v. *N.L.R.B. (Farmers Cooperative Compress)*, 416 F. 2d 1126, 70 LRRM 2489, *Farmers Cooperative Compress*, 194 NLRB No. 3.

n. Novel remedial issues including those arising under *I.U.E.* v. *N.L.R.B. (Tiidee Products, Inc.)*, 426 F. 2d 1243, 73 LRRM 2870.

II. ACCOMMODATION BETWEEN THE NLRA AND OTHER STATUTES

A. The NLRA And The Civil Rights Act of 1964

Particularly significant in the administration of the NLRA are cases involving the relationship between this act and other statutes. The last Quarterly Report, in presenting one such case, contained the observation that ". . . the interaction of the purposes and policies of the Act with those of other statutes and governmental programs has been a continuing source of interest and has presented problems of compromise and accommodation."

More recently, the need for this adjustment and accommodation was reflected in the Board's decision in *Graziano Construction Co.*, 195 NLRB No. 5. There, in finding a union fine to have violated Section 8(b)(1)(A), the Board pointed to the Supreme Court's language in *Scofield* v. *N.L.R.B.*, 394 U.S. 423, which indicates that overriding policies which Congress has imbedded in "the

labor laws" are relevant to a determination of whether an internal rule enforced by a union against a member reflects a legitimate union interest. This language, the Board said, implies an obligation on the part of the Board to consider "the full panoply of congressional labor policies in determining the legality of a union fine."

This Quarterly Report contains seven cases which focus on areas in which both the NLRA and some other statute are relevant and in which an effort was made to effectuate the basic policies of each. Three of these cases pertained to conduct affecting rights guaranteed by the Civil Rights Act of 1964; in four of these cases it was necessary to consider the impact of regulations issued during Phase I or Phase II of the Economic Stabilization Program; the last of these cases involved one of the rare instances in which state law can affect the exercise of rights under the NLRA.

Of the three cases which dealt with matters subject to the Civil Rights Act of 1964, the first resembled the case contained in the previous Quarterly Report in which the employer effected midterm modifications of the contract, over the union's objection, as a consequence of overriding national policy on employment opportunities for minority groups.

1. *Midterm contract modification to correct sex discrimination without the assent of the contracting union*

In this first case the parties had in the mid-1950's adopted a uniform retirement age for employees to be hired thereafter but retained from the previous pension agreement the retirement age for women already employed. By 1970 there were some 40 women who retained this earlier retirement right in a bargaining unit of several thousand employees. During the negotiation of the current bargaining agreement, the "grandmother" clause was modified in an attempt to conform to a ruling of a government agency on sex discrimination in employment; the parties agreed to a provision gradually phasing out the early retirement age for women hired

under the original pension plan. Soon thereafter, however, another government agency in a written interpretation concerning application of the Civil Rights Act of 1964 to pension plans, took the position that equalization of employment benefits must be achieved "immediately without waiting for gradual attrition of those affected." This agency suggested that immediate equalization could be accomplished by raising the retirement age for all women to that for men. But it also recognized that the retirement age for all employees might also be lowered to that provided for women in the original pension agreement. When the Employer proposed to the Union the former course, the Union insisted upon either retention of the existing contract provision for the gradual phasing out of the retirement age differential or a reduction of the retirement age for all employees to the lower age. Rejecting the Union's counter-proposals, the Employer made the retirement age of the 40 affected women to the higher age applicable to all the other unit employees.

The General Counsel believed that several factors militated in favor of dismissal of the resulting 8(a)(5) charge filed by the Union. The Employer was under a legal obligation to modify the existing contract provision on retirement age equalization; the Employer discussed the proposed change with the Union and did not act in bad faith in rejecting the alternatives offered by the Union; and the change effected by the Employer was consistent with the views of a federal administrative agency having direct responsibility for this subject. The General Counsel was convinced that the obvious necessity revealed by these facts for accommodating the statutory schemes of the Civil Rights Act and the NLRA in this instance brought into play the principles of the Supreme Court's decision in *Southern Steamship* v. *N.L.R.B.*, 316 U.S. 31. Accordingly, he concluded that the Employer's action which modified the contract without Union assent, but after bargaining, could not be viewed as violative of Section 8(a)(5) in these circumstances.

2. *Employee filing of charges with a State fair employment practice agency as an activity protected by the Act*

In the other two cases which involved conduct subject to both the Civil Rights Act and the NLRA, the charges were filed under Section 8(a)(1) of the Act. In each of these cases the Employer discriminated against the Charging Party for his having filed charges with the state fair employment practice agency alleging employer discrimination against Mexican-Americans such as himself. The filing of charges such as these with a state FEPC is, under Title VII of the Civil Rights Act of 1964, a prerequisite to the filing of charges with the Federal Equal Employment Opportunity Commission.

The General Counsel authorized the issuance of complaints in both of these cases alleging the discrimination to have violated Section 8(a)(1). The court, in *United Packinghouse, Food and Allied Workers* v. *N.L.R.B.*, 416 F. 2d 1126 (C.A.D.C.), expressed the view that employer discrimination on the basis of race or national origin violates the Act and the Board's decision on remand in that case did not reject the court's view. Under this view, a policy or practice of racial discrimination engenders an unjustified clash of interests between groups of employees, creating in the disfavored group an "apathy or docility" which inhibits them from asserting their rights under Section 7 to work collectively for the achievement of their legitimate employment goals. A reasonable extension of this view is the argument that employer interference with the filing of charges seeking the relief from such discrimination afforded by a concerned governmental agency has essentially the same effect in deterring employee exercise of Section 7 rights as the racial or national origin discrimination itself has.

Under outstanding precedent, the Board, as well as the EEOC, has the authority to enforce public policy against discrimination in employment based on race or national origin. Therefore, the General Counsel concluded that the attempted intimidation of an employee for filing a charge attacking such discrimination, even though that

charge is filed with an agency other than the Board, would likewise abridge rights guaranteed by the Act.

Considered distinguishable was the Board's ruling in *Hunt Tool Company*, 192 NLRB No. 29, in which the Board found that a single employee's filing a claim under the Jones Act was not a concerted activity and, therefore, not within the protection of the NLRA. There the claim made by the employee was "purely personal" while in these cases the charges filed with the State FEPC alleging discrimination on account of national origin were of a group or class nature, affecting all persons of this national origin who hold, or may apply for, jobs with the employers. Also, the remedy for a claim under the Jones Act consists only of damages to the claimant; the remedy under Title VII of the Civil Rights Act might eliminate discriminatory employment practices affecting the working conditions of employees generally and not merely those of the individual charging parties.

Finally, the bargaining agreement in one of these cases contained a provision barring discrimination on grounds of nationality, *inter alia*. The filing of a charge alleging ethnic discrimination with the State FEPC agency could be viewed a means of giving effect to the policy set out in the collective bargaining agreement itself. It was, therefore, considered to constitute a "concerted" activity in the same sense that an individual employee's filing a grievance under a bargaining contract is considered to be "concerted." *Bunney Brothers Construction Company*, 139 NLRB 1516.

B. The NLRA and The Economic Stabilization Act

The necessity of accommodating the NLRA to labor policies reflected in other statutes has arisen in still another area with the President's activation of regulatory machinery under the Economic Stabilization Act. The imposition of restrictions upon wages, one of the basic mandatory subjects of bargaining, has interjected a new element into collective bargaining and, not surprisingly, the General Counsel has been presented in several recent cases with questions as to the bargaining obligation of

employers and unions subject to Pay Board requirements. The determination in each case rested on its particular facts but each required a consideration of the relationship between the policies of the LMRA and the Economic Stabilization Program.

1. *Employer refusal to pay an agreed wage increase because of Pay Board regulations*

In one case, the question was raised as to an employer's good faith in refusing to make retroactive wage payments and initiating a challenge to these payments before the Pay Board. The Employer had separate agreements with two Unions which expired prior to the Phase I wage freeze. During Phase I the Employer negotiated new agreements with each of the Unions providing for retroactive wage increases effective as of the respective expiration dates of the old agreements. Each agreement stated that the wage increases were subject to the wage freeze and would be applied to the extent allowable under any applicable governmental controls. The Employer implemented the contracts on November 14, 1971, but declined to pay the retroactive increases for the period from August 15 through November 13, 1971, relying upon Economic Circular No. 102 at 502(6) which provided in pertinent part:

> However, for work performed after August 15 the actual rate which was in effect during the base period shall be the ceiling wage for the freeze period.

After implementing the remaining provisions of the contracts, the Employer, pursuant to Pay Board Regulations, requested the Pay Board to review the retroactive pay increases to determine whether they were consistent with Pay Board criteria. The Unions filed Section 8(a)(5) charges alleging that the Employer had engaged in bad faith bargaining by refusing to pay the retroactive wages for the period from August 15 through November 13, 1971, and by initiating review of the wage increases by the Pay Board.

Considering the Employer's actions in light of the outstanding regulations of the Pay Board and the provisions of the bargaining contracts subjecting retroactive increases to governmental controls, the General Counsel refused to authorize issuance of complaint. In his view, the Employer's seeking Pay Board review of the agreement to increase wages retroactively could not be found to conflict with bargaining obligations under the NLRA if the policies of this Act and those of the legislative and executive program for economic stabilization are to be accommodated one to the other.

2. *Employer reliance on wage guides to justify unilateral action in changing wages*

In different circumstances, however, the General Counsel concluded that Pay Board guidelines did not privilege the Employer's conduct which, absent the Pay Board regulations, would have plainly violated Section 8(a)(5) of the Act.

During the Phase I wage freeze, the Employer proposed to the Union that the new contract of the parties provide for a 6.5 percent wage increase and improved retirement benefits, to be effective at the end of the freeze period if permitted by law. When the Union advised the Employer that it accepted the proposal, the Employer took the position that it could not enter into the contract it had proposed. It first contended that the "proposals" exceeded "the President's wage restrictions," then that it wanted time in which to research the question. When the Union suggested that the Employer sign the new agreement and submit it to the Pay Board for approval, the Employer refused to do so. Later the Employer contended that the parties should wait and see what the new wage guidelines would be and that it was not obligated to bargain about wages which would exceed these guidelines. When the wage freeze expired and the Phase II guidelines were issued—providing a 5.5 percent standard for wage increases effective after Phase I—the Employer informed the Union that it was immediately putting into effect a 5.5 percent wage increase and the pension improvement previously "proposed."

The General Counsel authorized an 8(a)(5) complaint. He concluded that the Employer's unilateral institution of a wage increase different from the increase previously agreed to by the parties violated the Act. Also, it was concluded that the Employer acted in bad faith in refusing to treat the Union's acceptance of its proposal as consummating an agreement. This conclusion was based on the Employer's subsequent unilateral change of employment conditions, on its action in withdrawing its proposal after acceptance by the Union, and on the various contentions it made to justify this action. Finally, the Employer's withdrawal from its proposal after Union acceptance was viewed as a belated withdrawal after agreement had been reached on the terms of the contract. Accordingly, the Employer's refusal to sign the agreement reached was viewed as violative of Section 8(a)(5) under the *Heinz*[1] principle.

3. *Union insistence on the payment of a retroactive wage increase which violated Pay Board regulations*

A third case relating to the Economic Stabilization Act presented the question of whether a Union violated Section 8(b)(3) by insisting that the Employer make retroactive wage payments for work performed during the Phase I wage freeze. The Employer in that case was a subcontractor who began working on a construction project in September 1971. The Employer paid the wage rates of an area agreement between an employer association and the Union, but did not become a party to the agreement. The area agreement provided for a general wage increase effective October 1, 1971, but the increase was not put into effect because of the Economic Stabilization Program. Following expiration of Phase I of the Program, the employer association and the Union obtained approval from the Construction Industry Stabilization Committee to pay the wage increase of the area agreement retroactively to October 1, 1971. The Union then demanded that the Employer also pay the retroac-

[1] *H. J. Heinz* v. *N.L.R.B.*, 311 U.S. 514.

tive wage increase immediately. The Employer refused, taking the position that if he made retroactive payments for a period when he was not party to any agreement with the Union he would violate the Economic Stabilization Act unless the retroactive payment were first approved. He offered, however, to sign the agreement and grant the wage increase *in futuro* and to pay the retroactive increases if and when approved by the Pay Board. The Union continued to demand that the Employer immediately pay the wage increase retroactively to October 1, 1971, and when he refused, called a strike shutting down the construction site. The Employer filed an 8(b)(3) charge.

Viewing the Union's demand not as a request for an *agreement* to pay retroactive wage increases subject to Pay Board approval but as a demand for actual, immediate *payment* of retroactive wage increases without Pay Board approval, the General Counsel authorized issuance of complaint. Although the Pay Board had approved the retroactive increases provided in the area agreement, that approval had no bearing upon the Employer who was not bound by that contract. Because retroactive wage payments for the Phase I period in the absence of a contract approved by the Pay Board were contrary to Pay Board regulations, the General Counsel found the Unions to have violated Section 8(b)(3) by striking to secure, and by conditioning full agreement on, the Employer's immediate payment of the retroactive wage increase.

4. *Unprotectedness of a strike to compel payment of a wage increase exceeding the wage ceiling*

It is well established that, absent contractual restrictions, employees who strike to compel their employer to grant increased wages and to improve working conditions are engaged in concerted activity protected by the Act. However, the Board had long held that a strike to compel an employer to act illegally is not so protected. Cf. *American News Co., Inc.*, 55 NLRB 1302.

In a case arising on appeal during the last quarter, the Employer had agreed to grant its employees a wage increase but was prevented from doing so by the President's institution of the "wage-price freeze." The employees then struck to compel the Employer to implement the increase, and the Employer discharged the strikers. The General Counsel concluded that the principle enunciated in *American News, supra*, was controlling, that the employees were, therefore, not engaged in protected activity, and that their consequent discharges were not unlawful.

5. *Injunctive relief for ULP's involving the Economic Stabilization Act*

In the second and third of the above cases, having authorized complaints under Section 8(a)(5) and Section 8(b)(3), respectfully, the General Counsel recommended to the Board that temporary injunctive relief be sought under Section 10(j). In the 8(a)(5) case he pointed out that a ruling by the Pay Board could not be obtained on the wage increase agreed upon until the parties had signed a contract; absent such a contract and approval by the Pay Board, recoupment of the unpaid part of the wage increase pursuant to a Labor Board order might be limited to a period which would begin with Pay Board approval. Consequently, 10(j) proceedings to require the Employer to sign the agreed-upon contract were considered warranted. In the 8(b)(3) case he pointed out that the Union's unlawful conduct had totally shut down an important urban development project. While the General Counsel did not suggest that the temporary nature of Phase II would necessarily justify proceedings under Section 10(j) on all meritorious charges in which Phase II regulations are relevant, he did feel that in these two cases the temporary nature of Phase II warranted 10(j) proceedings to insure vitiation of the effects of the violations as completely as possible upon ultimate Board issuance of a remedial order.

The Board approved the General Counsel's recommendation that temporary relief be sought in the 8(a)(5) case. However, in the 8(b)(3) case the question of in-

junctive relief was mooted by the Union's termination of the strike.

C. The NLRB and State Right-to-Work Laws

Union insistence in bargaining on an agency shop agreement prohibited by a State Right-to-work Law

In one case the question of accommodation of the NLRA to other statutory labor policies was raised not by the Federal statute but by a State right-to-work law.

In bargaining, the Union had conditioned agreement on inclusion in the contract of an agency shop clause, a clause requiring the payment of a sum equal to membership dues to the bargaining representative. This form of union-security is privileged under Federal law, the Supreme Court having held an agency shop agreement to be a "less vigorous, less compulsory" form of union security than the union shop agreement which is privileged under the first proviso to Section 8(a)(3) of the NLRA. *N.L.R.B.* v. *General Motors Corp.*, 373 U.S. 734. The Employer nevertheless rejected the Union's agency shop proposal on the ground that it would violate the State right-to-work laws and filed a refusal to bargain charge against the Union.

The General Counsel found the Employer's contention to be well founded. That Section 14(b) of the NLRA reserves to the States the power to prohibit agency shop agreements and to enforce this prohibition was established by the Supreme Court's decision in *Retail Clerks Int'l. Assn., Local 1625, AFL-CIO* v. *Schermerhorn*, 373 U.S. 746, 375 U.S. 96. In the case before the General Counsel, the highest State court had not ruled on the illegality of an agency shop clause under the State right-to-work law, having declined to do so in the one case in which that issue reached the Court. But a State trial court and the State attorney general had both construed the law to include the agency shop as a proscribed form of union security. These opinions, in the absence of disagreement on the part of the State Supreme Court, were viewed as establishing that the State law proscribed execution or enforcement of an agency shop agreement.

The question which remained was whether the Union's insistence on an agency shop provision in this State violated Section 8(b)(3) of the Act. An agency shop clause is a permissible form of union security under Section 8(a)(3) of the NLRA and would also be a mandatory subject of bargaining if the state right-to-work law were not considered. The fact that a union security agreement is violative of state law does not make the execution or maintenance of such an agreement unlawful under the NLRA. Finally, under the *Schermerhorn* decision on reargument, *supra*, it is clear that while the state right-to-work law reaches execution and enforcement of an agency shop agreement, it does not reach a party's insistence upon such an agreement in bargaining negotiations. It could thus be argued that the NLRA leaves to the States the enforcement of state right-to-work laws, and that these laws are irrelevant to union security questions raised under the Federal statute.

The General Counsel rejected this argument in the circumstances of this case. He believed that no determination of the obligation to bargain under the NLRA could be justified which failed to take into consideration the untenable position in which the Employer would be placed if the Union were privileged in bargaining and in the exertion of economic pressure, adamantly to insist upon the Employer's acceding to a demand which would cause the Employer to violate valid state law. Accordingly, the General Counsel concluded that to achieve the accommodation, obviously necessary in these circumstances, between a state law sanctioned by Section 14(b) of the Act and the obligation to bargain under the Act, an agency shop clause must be considered not to constitute a mandatory subject of bargaining in a state in which such a clause is proscribed. It followed that by insisting on an agency shop and by conditioning the execution of an agreement covering mandatory subjects of bargaining on inclusion of such a provision, the Union violated its bargaining obligation under Section 8(b)(3) of the Act.

III. EMPLOYER THREATS

Employer threat to sue a union unless the union withdrew ULP charges

The Board has long recognized that right of any party to resort to civil suit for adjudication of its claims. However, a party may not threaten suit unless such threat is made in good faith and not for purposes of harassing or intimidating employees. *Clyde Taylor Company*, 127 NLRB 103, 108-109; cf. *United Aircraft Corp. (Pratt & Whitney Div.)*, 192 NLRB No. 62, slip op. 9-10, where the Employer was found to have had a reasonable basis for making such a threat.

In a case considered on appeal to the General Counsel during the past quarter, the Union struck in violation of the contractual no-strike clause and, upon termination of the strike and reinstatement of most of the strikers, filed a charge with the Board contesting the Employer's refusal to furnish information relating to the latter's refusal to reinstate certain other strikers. The Employer thereupon threatened to institute civil action to recover damages suffered during the strike, as well as damages resulting from the Union's filing of the unfair labor practice charge, unless the Union withdrew the charge. The Employer's defense of its conduct was grounded upon a contract clause which read, in pertinent part:

> In the event [of a strike in violation of contract] . . . the Union shall . . . advise the employees involved that unless they terminate such action, they will be subject to immediate discharge, and *the Union will not undertake any action in their behalf to modify or rectify such* discharge . . . . [Emphasis supplied.]

The General Counsel concluded that the Employer's threat was not in good faith but intimidated the employees and, therefore, constituted a violation of Section 8(a)(1). It was noted that merit had been found in a companion case in which the Union had sought information. Unlike *United Aircraft, supra*, the Employer's

action could not be said to have been "part of a good-faith effort to negotiate a settlement of the numerous claims arising out of [a] bitter strike . . ." (*Id.* at 10). Inasmuch as enforcement of the above clause in the instant circumstances would have had the effect of impeding access to the Board's unfair labor practice processes and would, therfore, have contravened public policy (See *N.L.R.B.* v. *General Motors Corp.*, 116 F.2d 306, 311-312 [C. A. 7]), it could not be said that the Employer's reliance upon such clause was privileged. Accordingly, the General Counsel authorized issuance of an 8(a)(1) complaint.

IV. PROTECTED CONCERTED ACTIVITIES

1. *Employees' civil suit against their employer and union as a protected activity*

Concerted employee conduct appeared in the unusual form of employee initiation of a court suit in one case in which the General Gounsel found this conduct to have been protected by Section 7 of the Act.

After losing the union offices they held in the last union election, the four employees involved in the case filed a ULP charge against their Employer alleging illegal assistance to the Union. After their charge was dismissed, they filed a civil suit for damages and injunctive relief against both the Employer and the Union, alleging the Employer to have conspired in their earlier ouster as officers in the Union and the Union to have improperly discriminated against them in its administration of the bargaining agreement. Shortly thereafter the Employer discharged them, at least in part because they had instituted this suit. The discharged employees in turn filed the instant 8(a)(1) and (3) charges against the Employer.

The General Counsel authorized complaint. He saw this case as turning on the fact that the civil action involved allegations of both employer interference with internal union administration and union impropriety in the performance of its functions as a statutory bargaining representative under Section 9(a) of the Act. Since

this employee action was clearly concerted in character and had as its object the vindication of the right of the charging parties to fair and equal representation, it was within the scope of the protection afforded employees by Section 7 of the Act. As the evidence did not establish that in filing this suit the charging parties defamed the Employer or intended the suit merely as a harassing tactic, the discharges were viewed as having violated the Act.

Applicability of a no-strike agreement to employees honoring a picket line maintained by a different union

The Board has been frequently called upon to determine whether particular strike activity is in derogation of "no-strike" clauses in collective bargaining agreements and therefore, unprotected by the Act. See, e.g., *The Hearst Corporation, News American Division*, 161 NLRB 1405. See also, General Counsel's Quarterly Report of Case Developments, No. R-1094, October 30, 1967, at pp. 8-9, 1967 Labor Relations Yearbook 393 (BNA).

In a recent appeals case employees refused to cross a picket line established by a sister local which was striking the Employer to secure a contract at a plant in another State. The Employer, in disciplining the employees, took the position that such conduct was prohibited by the no-strike clause which provided in pertinent part:

> Should differences arise between the Company and the Union as to the interpretation or application of the provisions of this agreement, or should any dispute of any kind arise, it is agreed that there shall be no work stoppages, walk-outs or slow-downs, until the entire grievance procedure has been exhausted . . . .

The question presented was whether this no-strike clause encompassed the kind of work stoppage in which the employees engaged by honoring the picket line. Had the no-strike clause simply prohibited work stoppages in "any dispute of any kind" without further qualification, the clause might well have applied in this situa-

tion. But since the clause prohibited work stoppages in such disputes only "until the entire grievance procedure has been exhausted," the clause, considered as a whole, plainly implied that "any disputes of any kind" was limited to disputes which were cognizable and processable as grievances under the contract grievance procedures. The dispute in the instant case which prompted the picketing concerned the negotiation of a new contract between the Employer and a different union at a different plant. Obviously, therefore, it was not a dispute which could have been filed and processed as a grievance under this contract. Accordingly, the General Counsel concluded that the dispute giving rise to the work stoppage here was not subject to, or proscribed by, the no-strike agreement contained in the contract and was, therefore, protected under Section 7 of the Act. Cf. *Kellogg Company*, 189 NLRB No. 123; *Montana-Dakota Utilities Co.*, 189 NLRB No. 111; *Hoffman Beverage Co.*, 163 NLRB 981.

V. UNION CAUSED DISCRIMINATION BASED ON ARBITRARY OR IRRELEVANT CONSIDERATIONS

1. *Union attempt to cause the discharge of an employee by means of a strike violating a non-strike clause*

The duty of a statutory bargaining representative under Section 9(a) to represent all unit employees fairly includes the duty to refrain from action affecting the employment rights of unit employees on the basis of "irrelevant, invidious, or unfair" considerations. *Miranda Fuel Co.*, 140 NLRB 181, 185. In the last quarter, the General Counsel was presented with a novel set of circumstances involving application of this principle.

The collective bargaining agreement between the Union and the Employer contained grievance and arbitration procedures and a no-strike clause. However, when the Employer "recalled" the Charging Party from layoff, the Union disputed his right to recall under the contract

and struck. The Employer capitulated and demoted the employee to a lower paying job. The employee responded by filing an 8(b)(1)(A) and (2) charge.

The Union's position as to the recall rights of the Charging Party was based on an arguable construction of the contract and there was no evidence of membership discrimination or arbitrary considerations motivating the Union's conduct; therefore, the Union could not be said to have acted for unprivileged reasons in disputing his right to recall under the contract. Cf. *Shield Radio & T.V. Productions*, 153 NLRB 68; *Triangle Publications*, 189 NLRB No. 105. And the Union's strike did not constitute an unfair labor practice under existing precedent merely because it violated the no-strike agreement. *Cheney California Lumber Co.*, 130 NLRB 235; *Island Creek Coal Co.*, 186 NLRB No. 60.

Reasoning that the Union's striking to cause the discharge of a unit employee in the face of the grievance, arbitration and no-strike provisions of the contract was "arbitrary" in the circumstances, the General Counsel authorized an 8(b)(1)(A) and (2) complaint. The Union's contractual undertaking to resolve employee job-rights disputes through the machinery provided in the collective bargaining agreement without resorting to economic force was considered not merely an assurance to the Employer of uninterrupted production. It was also considered to provide an assurance, on which unit employees might reasonably rely, that if the Union, as their statutory bargaining representative, disagreed with their employer over an employee's right to a particular job, the Union would seek settlement of the dispute through the agreed upon, orderly procedures provided in the contract rather than through resort to economic force. By acting in derogation of its contractual obligation to resolve disputes over employment status through the peaceful means provided by the contract, to the detriment of a represented employee, the Union was concluded to have failed in its statutory obligation to represent unit employees fairly.

2. *Union prevention of the hiring of blacks, in violation of the union's contract obligations*

A second case presented a more common combination of "*Miranda Fuel*" factors which figured in the Union's refusal to allow the employment of journeymen trainees. The Union, an incumbent bargaining representative, was a party to an employment plan which representatives of various governmental units, construction trade employers and unions, and interested civic groups had developed to expand the employment opportunities for minority groups in the building industry of the area. However, the Union opposed the hiring of all of the several blacks proposed by the employer association under this plan, ostensibly because of their lack of qualifications. The evidence established, however, that the Union was motivated by the fact that these applicants were black.

Since the Union's action was based on race, the case in this respect resembled the case presented in the previous Quarterly Report (79 LRR 53) involving a Union's preventing the employment of trainees for racial reasons. In the instant case, however, the finding of arbitrariness was also predicated on the fact that the Union acted against its agreement to participate in the minority hiring plan. Whether this plan was a part of the Union's collective bargaining agreement or was a separate agreement, it was viewed as an agreement to which obligations under Section 9(a) attached. The complaint which was authorized alleged the Union to have violated Sections 8(b)(1)(A), (2) and (3) by excluding these applicants for employment for "arbitrary" and "invidious" reasons. *The Business League of Gadsden*, 150 NLRB 312; *Houston Maritime Assn., Inc.*, 168 NLRB 615 and cases cited therein.

VI. UNION DISCIPLINE

1. *Removal of a union steward because of his intraunion charge that the union refused him rights under the contract*

In the first of the two cases involving union discipline of employee-members, the disciplined member had been a union steward who had believed himself entitled under the bargaining agreement to be selected as foreman on the job. However, he was passed over. When he filed intraunion charges alleging the business agent's failure to enforce the contract properly, the Union removed him from his position as steward.

The Union's disciplinary removal of the steward from office was considered "coercive" because of his loss of the exemption accorded stewards from payment of union dues and the special measure of employment protection for stewards provided in the contract.

The essential question posed by the Union's conduct was whether this union discipline invaded an "overriding policy of labor laws" and consequently went beyond the area of "legitimate union interest." Union discipline has been found to violate Section 8(b)(1)(A) on the basis of "overriding policy" in a variety of circumstances, including the expulsion of a member for filing ULP charges without first exhausting internal union remedies (*N.L.R.B.* v. *Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO, and its Local 22*, 389 U.S. 1035); the fining of a member for this same reason (*Charles S. Skura*, 148 NLRB 679); fining members for working during a strike proscribed by a no-strike clause (*National Grinding Wheel Corp.*, 176 NLRB 89); levying fines for breach of a union rule the enforcement of which constituted an unlawful midterm modification of the bargaining agreement (*Rochester Telephone Corp.*, 194 NLRB No. 144); and fining members who testify in support of the employer's position in an arbitration proceeding (*San Juan Islands Cannery*, 190 NLRB No. 5).

Authorizing issuance of an 8(b)(1)(A) complaint, the General Counsel viewed the steward's intraunion charge alleging the business agent's misapplication of the contract as raising a question of the Union's performance of its obligation under Section 9(a) of the Act to represent fairly employees for whom it is the statutory bargaining representative. Inquiry by a unit employee into a union's performance of its obligations under Section 9(a) was seen to involve a special area of "overriding policy" not subject to union coercion through internal membership discipline. Consequently, the Union's removal of the steward from office because of such activities was considered beyond the reach of the legitimate interests of the Union.

(2) *A union rule requiring members to authorize the checkoff of their union dues*

The salient feature of the second case on the subject of union discipline was a union rule that "where payroll deductions of union dues and fees is provided by a valid and subsisting contract with an employer, it shall be the only acceptable method [for the payment of membership dues]." The issue which concerned the General Counsel was whether this rule, considered wholly apart from any threats of enforcement made to specific employees and the existence of a union security agreement, constituted a violation of the Act.

Authorizing issuance of a complaint attacking this rule under Section 8(b)(1)(A) of the Act, the General Counsel relied on the Board's decision in *Westinghouse Electric Corp.*, 180 NLRB 1062, and *Michigan Bell Telephone Co.*, 184 NLRB No. 20. In the *Westinghouse* case the Board pointed out its repeated holding that "dues checkoff authorization must be voluntarily and that an employee has a right under Section 7 to refuse to sign checkoff authorization cards. Any conduct, express or implied, which coerces an employee in his attempt to exercise this right clearly violated Section 8(b)(1)(A)." (Footnote omitted.) In the *Michigan Bell* case, the Board found the union resolution requiring dues payments by

checkoff to violate Section 8(b)(1)(A). Here the Board did not rest any part of this conclusion on the existence of a union security contract or actual threats made in the enforcement of the requirement. These cases were deemed to reflect the Board's view that employee authorization of deductions from wages as a means of satisfying financial obligations to a union must be a matter of voluntary employee choice free from coercion in any form. As a consequence, the Union's rule, making payroll deductions the "only acceptable method" for the payment of union dues, backed by the disciplinary sanctions contained in the Union's constitution for its enforcement, was concluded to conflict with overriding statutory policy and to be outside the Union's disciplinary privilege in matters of legitimate interest to the Union.

This conclusion was not considered to be inconsistent with the Board's decision in *Arthur G. McKee & Co.*, 189 NLRB No. 68, where a union rule requiring the exhaustion of internal union remedies before resort to court or administrative proceedings was held not to violate Section 8(b)(1)(A) *per se*. In so holding, the Board accommodated the principle of exhaustion of internal remedies expressed in the Labor Management Reporting and Disclosure Act to the principle of access to the Board, observing that "since the LMRA and the LMRDA must coexist and complement one another under the statutory scheme and since the LMRA is not paramount, there is no way to say that a section commanding exhaustion of internal remedies is *per se* illegal." But no parallel or similar countervailing policy appears which must be coordinated with federal labor policy requiring that employee checkoff be wholly voluntary and free from coercion.

VII. REFUSAL TO BARGAIN

1. *Union refusal to submit disputes to contract arbitration procedures*

In one charge, the Employer alleged the Union to have refused to bargain in violation of Section 8(b)(3) by refusing to arbitrate several disputes arising over the

Employer's discipline of union stewards. While the Union followed the contractual grievance and arbitration procedures in other kinds of disputes, it refused to do so in disputes over the Employer's treatment of stewards because of a long and documented history of Employer violations *vis-a-vis* union stewards.

The General Counsel was cognizant of precedent indicating that the refusal to arbitrate a dispute does not, standing alone, constitute an unlawful refusal to bargain. *Textron Puerto Rico*, 107 NLRB 583; *Central Illinois Public Service Co.*, 139 NLRB 1407; *Hortex Manufacturing Co.*, 147 NLRB 1151. He found it unnecessary to rely on this precedent, however. In authorizing dismissal of the charge he relied instead on both the history of unfair labor practices by the Employer involving stewards and the fact that the parties had not in the course of their relationship "mutually and voluntarily resolved the disputes which inhere in collective bargaining." *Collyer Insulated Wire*, 192 NLRB No. 150. Proceeding to 8(b)(3) complaint based on the Union's refusal to submit such disputes to arbitration was deemed unwarranted where, as here, unfair labor practice charges concerning such disputes would not be deferred for arbitration under either *Collyer*, *supra*, or *Dubo Manufacturing Corp.*, 142 NLRB 431. *United Aircraft Corp.*, 188 NLRB No. 96, slip opinion, footnote 1.

2. *"Successorship" of a purchaser after a 2-month hiatus in operations*

Changes in ownership of business enterprises give rise to a number of "successorship" problems in the administration of the Act. Essential to the resolution of such problems is the concept of the "continuity of the employing enterprise." Thus, the substantiality of any disruption of operations must be considered in determining whether successorship exists. Compare, e.g., *The Northwest Glove Co.*, 74 NLRB 1697, at p. 1699 (aprx. 1-month hiatus; successorship found), with *Gladding-Paris Corp.*, 192 NLRB No. 40, slip op. p. 2 fn. 2 (2-month hiatus; no successorship). See also *General Coun-*

sel Quarterly Report on Case—Handling Developments, No. R-1094, October 30, 1967, at 10-11, 1967 Labor Relations Yearbook 393 (BNA).

In a recent appeals case, Respondent Employer defended its refusal to recognize the Union which represented its purported predecessor's employees on the ground that an approximate two-month hiatus in operations precluded a finding that it was a successor. In rejecting this argument, the General Counsel noted that at the time of purchase Respondent had met with the employees, announced the temporary closing and promised that they would be recalled by seniority upon resumption of operations. Since Respondent did in fact recall the employees as promised and manufactured basically the same products under the same top officials at the same location with essentially the same equipment and machinery, the hiatus was considered of insufficient consequence to defeat successorship.

3. *Denial of a bargaining order based on authorization cards to a union with a history of "sweetheart" recognition*

A combination of circumstances in a case considered in this quarter resulted in unusual action by the General Counsel when he authorized the issuance of an 8(a)(5) complaint but refused to seek the customary remedy of a bargaining order.

The unlawful employer conduct occurred in the context of a strike for recognition and included a disparity in the wages paid strikers and non-strikers, the withholding of accrued vacation benefits from strikers, and coercive statements made by the Employer. Normally this conduct on the part of an employer would be considered sufficient, given the union's authorization card majority, to warrant complaint alleging violation of 8(a)(5) and (1) and to justify a request for a bargaining order under the rationale of *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575. In this case, however, the General Counsel decided that the interests of the employees involved, and of employees generally under the Statute,

would be best served by not seating the Union in the absence of a certification after a Board-conducted election.

Although the Union had not obtained its card designations in this particular case through coercion or misrepresentation, it had a substantial history of unlawful, collusive recognition arrangements in this geographical area. In fact, based on several Board and court cases reflecting this history, the trial examiner in a case presently pending before the Board had recommended, at the General Counsel's request, a Board order barring the Union for a three year period from accepting recognition for any new group of employees unless certified by the Board following an election.

Although the case pending before the Board involves a "sweetheart contract" and the case being considered by the General Counsel did not, the General Counsel felt that the long history of "sweetheart" conduct, derogating from the right of employees to proper representation, militated against seeking an order installing the Union as the statutory representative on the basis of authorization cards alone. On the other hand, the General Counsel recognized that the Board might nevertheless disagree and find a customary bargaining order to be appropriate in the circumstances of this case. In order, therefore, not to preclude the Board's adoption of such an order, the General Counsel authorized a complaint which included an allegation of a refusal to bargain in violation of Section 8(a)(5).

VIII. SECONDARY BOYCOTTS

1. *Definition of a "labor organization" applied to a group in which only a small proportion of the participants are statutory employees*

The last Quarterly Report of the General Counsel presented a case in which it was found that a civil rights group organized by blacks to promote greater employment opportunities for blacks was not subject to the provisions of Section 8(b)(1)(A) of the Act because it did

not constitute a "labor organization" within the meaning of Section 2(5) of the Act. In a more recent case the question of the definition of a "labor organization" was posed in a different context. The alleged labor organization was charged with having conducted a secondary boycott violative of Section 8(b)(4) and having entered into an agreement violative of Section 8(e).

The workers represented by, and the membership of, the organization in question consisted almost entirely of "agricultural laborers." Because agricultural laborers are outside the definition of "employee" provided by Section 2(3) of the Act, an organization consisting *entirely* of such laborers would, under the definition contained in Section 2(5) of the Act, not constitute a "labor organization" subject to the provisions of the Act inasmuch as it would not be an organization "in which employees participate. However, the organization in this case did *not* consist entirely of agricultural laborers. Thus, investigation of the charges revealed that this organization represented and admitted to membership about 100 individuals whom the Board would hold to be statutory employees because they worked in "commercial" packing sheds handling the agricultural products grown by others. Also considered significant was the fact that in the dispute giving rise to the boycott, the organization sought to become the bargaining representative of more than 100 non-agricultural workers who were clearly "employees" within the meaning of the Act. Cf. *Graham Transportation Co.*, 124 NLRB 960.

Having found that "employees" participated in the charged organization and that it sought to represent statutory employees, the General Counsel concluded that outstanding Board precedent required rejection of any contention that these "employees" were too few in number to constitute the organization a "labor organization" as that term is defined in the Act. In *Masters, Mates and Pilots*, 144 NLRB 1172, 1176-1178, the Board dealt with this same problem except that the group there found to be a labor organization consisted almost entirely of supervisors. In disagreement with the view of a circuit court expressed at an earlier stage in that proceeding,

the Board took the position that it would find the organization to be a labor organization even if "the number of employees in [the organization] was not substantial." In explicating this position the Board did not indicate that an organization must admit to membership and represent any minimum number or proportion of statutory employees to meet the statutory requirement that "employees participate" in a "labor organization." As recently as 1969 the Board cited the *Masters, Mates and Pilots* case as authority on this subject. *Pacific Far East Line, Inc.*, 174 NLRB 1168.

While the *Masters, Mates and Pilots* case pertained to an organization consisting largely of supervisors, the General Counsel saw no way in which the Board's rationale in that case could be found not to apply to an organization, such as that in the instant case, composed largely of agricultural laborers. This conclusion was particularly bolstered by the fact that in *Masters, Mates and Pilots*, where the group consisted principally of supervisors, the Board relied on precedent involving a labor organization composed primarily of agricultural workers.

The General Counsel, therefore, took the *Masters, Mates and Pilots* case as compelling the conclusion in the instant case that the charged organization is a "labor organization." As this organization had clearly engaged in secondary boycotts and entered into 8(e) agreements with employers as defined in the Act, the General Counsel authorized issuance of an 8(b)(4)(B) and 8(e) complaints.

2. *"Ally" doctrine applied to non-unit work farmed out by a struck employer*

Section 8(b)(4)(B) of the Act prohibits a union from enmeshing "neutral" employers in picketing or other coercive conduct lawfully directed toward a primary employer with whom the union has a labor dispute. However, the Board and courts have long held that an employer who performs "struck work" of the primary employer has so "allied" itself with the primary that the former can no longer be considered a "neutral" employer

for purposes of Section 8(b)(4)(B). See *Douds* v. *Metropolitan Federation of Architects, Local 231, (Project Engineering Co.)*, 75 F. Supp. 672; *California Laundry & Linen Supply*, 164 NLRB 426.

In a recent appeals case, the General Counsel was called upon to decide whether this ally doctrine applied to a situation where the work being performed by the subcontractor was not the "struck work" of the employees with whom the general contractor had a dispute. The primary employer was engaged in the manufacture of steel products and also engaged in the construction industry as a steel erection subcontractor. Its production and maintenance (P & M) employees and job-site construction employees were represented by separate sister locals of the same international union and were covered by contracts having different expiration dates.

The P & M employees struck the Employer in support of contract renewal demands and engaged in "roving picketing" of the Employer's trucks as they were making deliveries to various job-sites. When the employer's construction employees refused to perform that part of their normal work involving the unloading of the trucks at the job-sites, the employer subcontracted the unloading and steel erection to another employer. However, the P & M employees would picket the truck whenever employees of the new contractor attempted to unload the steel.

Authorizing dismissal of the 8(b)(4)(B) charge filed by the Employer, the General Counsel concluded that the picketing constituted lawful primary activity notwithstanding the fact that the unloading work was not the work of the striking P & M employees. It was noted that the Board and courts had never held that the "struck work" doctrine had application only where the work in question was work of the striking employees with whom the subcontracting employer had a primary dispute. Rather, all that is required is that the work would have been performed by any employees of the primary employer but for the strike—as was the instant situation. See *Douds, supra.*

IX. RECOGNITIONAL AND ORGANIZATIONAL PICKETING

1. *Determination of the "commencement of" and "a reasonable period" as to picketing occurring in separate periods*

Section 8(b)(7)(C) limits recognitional and organizational picketing to "a reasonable period of time not to excess thirty days" if a representation petition is not filed before the expiration of that period. In one case arising in the last quarter, the separation between the two periods of the Union's picketing raised a question under both the specific 30-day limitation and the more general "reasonable period" test of Section 8(b)(7)(C).

The Union's first picketing of the Employer for recognition stopped on the thirtieth day. After the first period of picketing, the Union told the Employer that picketing would be resumed if the Employer did not recognize, and contract with, the Union. Then, after a 7-month hiatus, the Union resumed picketing for recognition. After this latter picketing had continued for about 2 weeks, the General Counsel authorized issuance of a complaint under Section 8(b)(7)(C), no representation petition having ever been filed.

The complaint was predicated in part on the theory that the more recent picketing was but a continuation of the earlier picketing and therefore the picketing had been continued for more than 30 days after its commencement. Thus, the Union, after the first picketing period, threatened the resumption of picketing if recognition were not granted. And the renewed picketing was conducted by the Union against the Employer in the same geographical area.

The complaint was also predicated on the theory that even if the later picketing was not considered a continuation of the earlier, the more recent picketing of 14 days duration continued for a period which in the circumstances was longer than was "reasonable." This was based on the fact that the Union had earlier picketed the employer for 30 days for this same purpose. Sup-

port for this theory was found in *Stan-Jay Auto Parts*, 127 NLRB 958, enf'd 289 F.2d 41 (C.A. 2) where the Board found that the 17 days of picketing after the effective date of Section 8(b)(7) constituted more than a reasonable period in view of the 2 months of antecedent picketing which immediately preceded the effective date of Section 8(b)(7). See also *Sapulpa Daily Herald*, 138 NLRB 180, enf'd. 321 F. 2d 771 (C.A. 10).

The General Counsel rejected the argument that Section 10(b) would preclude issuance of a complaint because the original picketing occurred more than 6 months before the charge was filed. Under either of the theories on which complaint was authorized, the picketing which exceeded the time limitation of Section 8(b)(7)(C) occurred within the 10(b) period. In the opinion of the General Counsel, the Court's decision in *N.L.R.B.* v. *Bryan Manufacturing Co.*, 362 U.S. 411, justified reliance on the earlier picketing as background evidence. Particularly with respect to the second theory of the complaint, it was noted that in the *Stan-Jay* and *Sapulpa* cases the Board relied on picketing which, although not outside the 10(b) period, was nevertheless lawful because it predated the effective date of Section 8(b)(7).

2. *Projection of annual dollar volume, under Board jurisdictional standards, of an enterprise picketed from its inauguration*

In acting the National Labor Relations Act, as amended, Congress vested the Board with jurisdiction extending to all enterprises whose operations "affect" interstate or foreign commerce. But Congress has recognized the Board's discretion to limit assertion of jurisdiction to enterprises whose effect on commerce is considered substantial. Pursuant to such discretion, the Board has established for the retail industry a minimum $500,000 gross volume standard over a twelve-month period. Where an enterprise has been in operation for less than twelve-months, the Board will determine whether there appeared a "reasonable expectation that the Company in a 12-month period. . . [would] attain minimum jurisdictional

requirements." See *Atlas Roofing Co., Inc.*, 131 NLRB 1267, 1268-1269; *Delta Match Corp.*, 102 NLRB 1400. Such an expectation was not deemed reasonable notwithstanding a loss of business due to picketing, where financial data for a 2-month period prior to the picketing did not support the expectation. *Cenit Noll Sleep Products, Inc.*, 115 NLRB 318.

In a recognitional picketing case arising during the past quarter the General Counsel was called upon to decide, on appeal, whether jurisdiction should be asserted over an employer who had been picketed from the very commencement of operations and therefore had never experienced a normal period upon which an expectation of its 12-month dollar volume could be projected. However, other factors in the case persuaded the General Counsel that jurisdiction should be asserted. Thus, the two owners of the new enterprise had many years of experience in the business and its CPA had made an estimate, based upon the enterprise's investments and other commitments, that the business would realize an annual gross volume of $650,000. Since the enterprise's failure to realize such projection was not shown to have been attributable to any factors other than the effectiveness of the Union's picketing, a refusal to assert jurisdiction would have had the effect of rewarding the union for its successful picketing and not exposing it to Board sanctions except where such picketing was relatively ineffective. See *Fairmount Construction Co.*, 95 NLRB 969, Kachco Corp! d/b/a Hickory Farms of Ohio, 180 NLRB 755.

Accordingly, the case was remanded to the Regional Director for a determination on the merits of the case.

X. FEATHERBEDDING—SECTION 8(b)(6)

1. *Union demand for the payment of a "walking boss"*

In the past quarter, the General Counsel considered two cases arising under Section 8(b)(6) of the Act. Under that section, a labor organization may not "cause or attempt to cause any employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed."

In the landmark case of *N.L.R.B. v. Gamble Enterprises, Inc.*, 345 U.S. 117 (1953) the Supreme Court in concluding that Section 8(b)(6) had not been violated, stated:

> We are not dealing here with offers of *mere "token" or nominal services.* The proposals before us were appropriately treated by the Board as offers in *good faith of substantial performance by competent musicians.* There is no reason to think that sham can be substituted for substance under 8(b)(6) any more than under any other statute. Payments for "standing-by" or the substantial equivalent of "standing-by," are not payments for services performed, but when an employer receives a bona fide offer of *competent performance of relevant services,* it remains for the employer through free and fair negotiation, to determine whether such offer shall be accepted and what compensation shall be paid for the work done. [Emphasis supplied.]

The General Counsel concluded in the first case that authorization of a Section 8(b)(6) complaint was warranted to permit Board determination of the applicability of the Court's decision in the circumstances of the case.

The Employer in this case was the only operator in the area of river barges for the transportation of grain. At each port the Employer had always used two employees, a machinery operator and a helper, for the loading and unloading except at one port where the local representing the helpers insisted that two helpers be retained. A union at another port, from whom the Employer secured its trained machinery operators, was the only source of these semi-skilled operators.

The Charged Union, which had no bargaining relationship with the Employer, demanded that the Employer hire a "walking boss" to supervise the loading employees and keep their timecards. The Employer objected, pointing out that having never worked aboard such barges the members of the Charged Union were not qualified to operate the machinery, let alone supervise this oper-

ation, and that the job of keeping time records was already being performed by the machine operator. To the Employer's contention that the Union was demanding that the Employer put a man on its barges to do nothing, the Union's only response was to threaten picketing. The Employer capitulated to the Union's demand at one port and accepted a "walking boss" sent by the Union who had no qualification pertaining to the type of work performed by the Employer's machinery operator and two helpers at that port. This "walking boss" was paid at a higher rate than the other loading employees and he entered a 10-hour day on this timecard notwithstanding the other employees worked only an 8-hour day.

The General Counsel recognized that the absence of economic value to an employer of the employee service which a union demands the employer use and pay for, does not in itself render the union's demand a violation of Section 8(b)(6). *American Newspaper Publishers Assn.* v. *N.L.R.B.*, 345 U.S. 100. But the General Counsel understood the Court to have indicated that the Union must be making a bona fide offer of the competent and substantial performance of relevant services, as distinguished from an offer of "mere 'token' or normal services."

In this case, the "walking boss" was plainly not competent to perform the service for which he was offered by the Union—he was totally unfamiliar with, and unqualified for supervision of, the Employer's operations, and the Union did not make even a pretense of disputing the Employer's assertion that its members were unqualified to perform the function for which the Union offered them. And as keeping the timecards of the operator, the two helpers and the "walking boss" must have required no more than 5 or 10 minutes a day, the services which the Union proposed that the "walking boss" provide the Employer could hardly be characterized as "substantial."

Nor could the Union's demand be considered privileged under *Rabouin d/b/a Conway's Express*, 87 NLRB 972. In that case, the Board, in finding Section 8(b)(6) not to have been violated, observed that the union's demand for payment of money was "made under color of right,

in the nature of a claim for damages for breach of contract." In the instant case, there was neither a contractual nor a bargaining relationship between the Employer and the Union.

In these circumstances, the General Counsel concluded that the Union had offered the Employer " 'token' or normal services," and that the Union's offer was made in bad faith and without any "color of right." It was accordingly concluded that the Union's demand of payment by the Employer for the purported services offered by the Union violated Section 8(b)(6).

2. *Union's demand for money made under a "color of right" in view of the union membership of the employer who breached union rules*

In the other Section 8(b)(6) cases presented to the General Counsel, it was concluded that the charge should be dismissed because the Union's demand was considered to have been made under a "color of right."

The Employer was a member of the Union. After he discharged three employees, the Union, acting under its bylaws, convened an intraunion tribunal to determine whether the discharges violated the Union's bylaws and to award damages for any such violation. The Employer fully participated in the proceedings and was given the opportunity to be represented by counsel. The tribunal concluded that the discharges were invalid and awarded damages to the employees involved. After the Union sought to collect the awards, the Employer filed the 8(b)(6) charge contending that the Union was demanding payment for services not performed and not to be performed.

The General Counsel relying on *Conway's Express, supra*, concluded that the charges were without merit. Although the Union's claim was not based on the breach of a collective bargaining agreement, it was premised on an alleged breach of a union bylaw to which the Employer was "bound" by virtue of his membership in the Union. In these circumstances, it was concluded that the awards were in the nature of a claim for damages for breach of contract and not a demand "in the nature of an exaction."

Oct. 31, 1968

This case was submitted for advice because it involves doubtful legal issues.

FACTS

As a member of a multi-employer bargaining unit, the company was party to a contract with the Charging Union which required that unresolved issues arising in the course of its renegotiations be submitted to the Council on Industrial Relations for final and binding decision. When impasse was reached in the renegotiation of this agreement, the disputed issues were submitted to the Council on Industrial Relations pursuant to the terms of the contract.

The Council on Industrial Relations issued its decision on May 21, 1968, which the Union incorporated in a draft contract and mailed to employers in the multi-employer unit on June 6.

On June 16, the Union notified the Employer that its contract was being cancelled because of its 17-week delinquency in making the required payments to the fringe benefit fund, the contract having provided for its cancellation upon that contingency. However, neither the Employer nor the Union took further action with respect to this cancellation notice and when the other unit employers signed the new contract on July 25, the Union demanded that the Employer do so. The Employer declined, saying that he wanted to discuss it with his partner first. Hearing nothing from the Employer further, the Union filed the instant charge on July 29.

ACTION

It was concluded in agreement with the Region and based on its fact findings that the Employer's refusal to sign the collective bargaining agreement incorporating the findings of the Council of Industrial Relations constituted a violation of Section 8(a)(1) and (5) of the Act.

This conclusion did not require a determination whether the Employer would have violated the Act if it had refused to submit the bargaining dispute to the Council on Industrial Relations for a binding decision pursuant to the terms of the expiring agreement. Rather, it was based on the fact that the Employer acquiesced in the submission of the dispute to the Council on Industrial Relations for a binding decision, on the fact that in the two months which followed the Council's issuance of its decision the Employer raised no objection to content of the contract and the manner of its determination, and on the fact that even after the 8(a)(5) charge alleging the Employer's refusal to execute the contract was filed, the Employer did not contend that the bargaining dispute had been improperly submitted to the Council on Industrial Relations. In these circumstances, it was concluded that the Employer had agreed to be bound by the contract terms determined by the Council on Industrial Relations and was accordingly obligated to sign the contract upon request.

Nor was the Union's purported cancellation of the contract on June 17, 1963, considered to relieve the Employer of his obligation under Section 8(a)(5) to execute the agreement. As the parties were engaged in bargaining for a multi-employer unit, the Union's purported cancellation of the agreement would have constituted an attempted withdrawal from that unit for the purpose of bargaining with the Employer. Such a withdrawal from the multi-employer bargaining would be ineffective as untimely under the rule of *Retail Associates*[1] unless it had been accomplished by mutual assent of the parties to the agreement. However, the Union's subsequent demand that the contract be executed, made to the Employer before the Employer had in any way indicated its assent to withdrawal from the multi-employer unit, necessarily constituted a retraction of its earlier notification of the cancellation of the agreement. And the Employer's response to this demand for contract execution did not suggest it was accepting or relying on

[1] 120 NLRB 388 (1958).

the Union's earlier purported cancellation of the agreement.

Accordingly, the Region was authorized to issue an 8(a)(5) and (1) complaint based on the Employer's refusal to execute the agreement.

---

[2] Cf. *H. J. Heinz Co.* v. *NLRB*, 311 U.S. 214.

These cases were submitted for advice pursuant to Manual Section 11751.1(d) because of the possibility of outside inquiries addressed to Washington and because of the 10(j) relief request.

In agreement with the Region's recommendation and in substantial agreement with its reasoning, it was concluded that further proceedings on all of the charges in these cases were unwarranted in the circumstances.

It was concluded in agreement with the Region that in view of the relationship between the two multi-employer associations,[1] their threat of lockout on behalf of their employer members was privileged. It was also concluded, based upon the Region's findings, that the Associated had not conditioned contractual agreement upon a merger of certain trust funds. With respect to the allegation relating to the Associated's refusal to furnish the Union information as to the individual employers for whom it was bargaining, it was concluded that the Associated was not obligated to furnish this information[2] in the absence of a showing of need, as e.g., in circumstances where there was a privileged withdrawal of employers from association membership.[3]

* * * was concluded in substantial agreement with the Region that the evidence did not show that the Union had adopted a "take it or leave it" bargaining position. Instead, as indicated by the many bargaining sessions and the matters discussed there as shown by the bargaining minutes, the Union indicated a willingness to modify its wage proposals when the Employer increased its wage offer, but stated it considered voluntary overtime a "strike issue". While with respect to the Union's soliciting Associated members to sign individual contracts dur-

[1] Cf. *Evening News Association*, 166 NLRB 219.

[2] This information request related to the statute of the collective bargaining representative rather than to the 8(d) subjects of collective bargaining.

[3] It was also noted that here the Associated notified the Union that the employer withdrawals were ineffective.

ing the negotiations with the Associated, the Union's conduct was not viewed as privileged even though individual contracts were not signed, urging a violation on the basis of this conduct was considered unwarranted in the circumstances. In this regard, it was noted that only four of approximately 67 employees were solicited by the Unions, the solicitations were conducted without strikes for recognition or other substantial coercion,[4] and all the solicited employers refused to deal with the Union.

Likewise, with respect to the unilateral wage increases it was concluded that further proceedings were unwarranted even though it appears that the wage increases were not revoked. In this regard, it was noted that only 2 of approximately 67 employers instituted wage increases after the current contract expired, and it appeared that multi-employer contract negotiations would result in agreement that at least the amount of the increase given would be granted retroactively.[5]

In all these circumstances, and particularly in view of the extensive collective bargaining which occurred in these cases, it was concluded that all the charges should be dismissed, absent withdrawal.

---

[4] The strike threat made by local in connection with the solicitation of one member was considered to be an isolated incident insufficient to support the Section 8(b)(3) charge.

[5] Of course, if the Region finds on the facts that the parties were at impasso on the wage increase issue, and such increases were consistent with the Associated's wage offer, such increases would be privileged. *Empire Terminal Warehouse Company*, 151 NLRB 1359. However, *Empire Terminal*, in which wage increases *after impasse* were found privileged, should not be construed to equate unilateral wage increases with subcontracting as a permisable temporary stop-gap measure in the face of a threatened union strike.

February 28, 1969

In agreement with Region's recommendation and based on its fact findings, conclusions and reasoning [1] it was concluded that further proceedings were unwarranted in this case. Cf. *Darling & Co.* 171 NLRB No. 95; *Betts Cadillac Olds*, 96 NLRB 268.

ROF-1

[1] It was noted that the Region found that "the parties at a very early stage crystallized an economic difference which has persisted to date."

July 30, 1969

The case was submitted for advice on the question of the legality of the Employer's actions.

Based on the Region's fact findings and in agreement wtih its recommendations and reasoning, it was concluded that authorization of complaint was warranted to place the issues of the case before the Board.

Enclosures: 3 ROFs

---

[1] *American Stores Packing*, 158 NLRB 620.

This case was submitted for advice because it involves doubtful legal issues.

FACTS

As a member of a multiemployer bargaining unit, Employer was party to a contract with the Charging Union which required that unresolved issues arising in the course of its renegotiations be submitted to the Council for final and binding decision. When impasse was reached in the renegotiation of this agreement, the disputed issues were submitted to the Council pursuant to the terms of the contract.

The council issued its decision on May 21, 1968, which the Union incorporated in a draft contract and mailed to employers in the multiemployer unit on June 6.

On June 16, the Union notified the Employer that its contract was being cancelled because of its 17-week delinquency in making the required payments to the fringe benefit fund, the contract having provided for its cancellation upon that contingency. However, neither the employer nor the Union took further action with respect to this cancellation notice and when the other unit employers signed the new contract on July 25, the union demanded that the Employer do so. The Employer declined, saying that he wanted to discuss it with his partner first. Hearing nothing from the Employer further, the Union filed the instant charge on July 29.

ACTION

It was concluded in agreement with the Region and based on its fact findings that the Employer's refusal to sign the collective bargaining agreement incorporating the findings of the Council constituted a violation of Section 8(a)(1) and (5) of the Act.

This conclusion did not require a determination whether the Employer would have violated the Act if it had refused to submit the bargaining dispute to the Council for a binding decision pursuant to the terms of the expiring agreement. Rather, it was based on the fact that

the Employer acquiesced in the submission of the dispute to the Council for a binding decision, on the fact that in the two months which followed the Council's issuance of its decision the Employer raised no objection to content of the contract and the manner of its determination, and on the fact that even after the 8(a)(5) charge alleging the Employer's refusal to execute the contract was filed, the Employer did not contend that the bargaining dispute had been improperly submitted to the Council.

In these circumstances, it was concluded that the Employer had agreed to be bound by the contract terms determined by the Council and was accordingly obligated to sign the contract upon request.

Nor was the Union's purported cancellation of the contract on June 17, 1968, considered to relieve the Employer of his obligation under Section 8(a)(5) to execute the agreement. As the parties were engaged in bargaining for a multiemployer unit, the Union's purported cancellation of the agreement would have constituted an attempted withdrawal from that unit for the purpose of bargaining with the Employer. Such a withdrawal from the multiemployer bargaining would be ineffective as untimely under the rule of *Retail Associates*[1] unless it had been accomplished by mutual assent of the parties to the agreement. However, the Union's subsequent demand that the contract be executed, made to the Employer before the Employer had in any way indicated its assent to withdrawal from the multiemployer unit, necessarily constituted a retraction of its earlier notification of the cancellation of the agreement. And the Employer's response to this demand for contract execution did not suggest it was accepting or relying on the Union's earlier purported cancellation of the agreement.

Accordingly, the Region was authorized to issue an 8(a)(5) and (1) complaint based on the Employer's refusal to execute the agreement.[2]

G. B.

---

[1] 120 NLRB 388 (1958).

[2] Cf. *H. J. Heinz Co.* v. *NLRB*, 311 U.S. 514.

As submitted by the Region, the disputed issue is whether in the circumstances of this case the Employer's withdrawal from the multiemployer bargaining unit was timely in a situation involving a prematurely extended contract which was to take effect prior to the original termination date. The Employer has contended that, regardless of the outcome of bargaining between the Association and Union, it retains a right to withdraw during the 60-90 day period prior to that original termination date.[1]

In all the circumstances, it was concluded that the Employer violated Section 8(a)(1) and (5) of the Act by its attempted untimely withdrawal from multiemployer bargaining and its refusal to sign the agreement reached by the Association and the Union.[2]

At the outset it was noted that there is apparently no dispute that the Employer, prior to its attempted withdrawal here, was a member of the multiemployer Association and had manifested an intention to be jointly bound in bargaining.[3]

---

[1] On the basis of the File submitted by the Region, it was not clear if the Employer raised this defense pursuant to an *express withdrawal* provision in the Master Agreement executed February 1, 1961, and incorporated in the 1965-1968 contract. The 8(a)(5) authorization contained herein is based on the assumption that the only relevant contract provision is a 60-day reopener clause, similar to the one found in the newly executed 1967-1970 agreement (Article 43). If there should in fact be an express contract provision relative to withdrawal rights in the 1965-1968 agreement, the case should be resubmitted for advice.

[2] The Region has found that the Board would assert jurisdiction over the Employer based on its Association membership. Subsequent to the charge herein the Employer filed an RM petition, currently blocked pending disposition of this case.

[3] In this regard it was noted that the Association has had collective bargaining agreements with the Union since at least 1961, covering a multiemployer bargaining unit; that the Employer was a member of the Association when purchased by Employer owner on January 1, 1963; that he became party to and/or accepted a contract then in effect between the Association and Union for a term from February 1, 1961 to December 41, 1963; and further that this contract was extended and, following its expiration on December 31, 1964, Employer owner signed a newly negotiated

It was further noted that in late October 1966, the Union sent letters to the Association and its members asking to reopen the contract, which was to expire February 28, 1968, for a cost-of-living increase. Actual talks with the Union did not start until July 1967. During the interim, Association officers and members discussed the Union's request among themselves, and held a meeting at which time a majority voted to seek a new contract to take immediate effect and to include a new terminal date, rather than limiting talks to a cost-of-living modification of the existing contract. The Region found that the Employer was not represented at this meeting, and that there is conflicting evidence as to when and how he was put on notice of the Association's decision. However, the Employer's owner admitted through his attorney that he "*was aware of the negotiations going on* but only 'through the grapevine' and his information and natural assumption was that *the contract being negotiated was to take effect on the expiration of the contract currently in force*, that is, February 28, 1968." (Emphasis added.) Thus, on the basis of the Employer's own statement, it is established that at some time prior to the completion of bargaining the Employer knew that a new contract was being discussed. Despite the Employer's position now that it had been intending "for a year or more" to withdraw from multiemployer bargaining upon the expiration of the 1965-1968 contract, at the time the Employer's owner became aware of new contract discussions his only action was to object to Association members about the enlarged scope of the negotiations. It was particularly noted that the Employer's owner gave no indication that he wanted to withdraw immediately from the multiemployer Association and bargaining unit, or that he intended to do so at the end of the current contract term. He made no attempt to reserve his purported right to withdraw during the 60-90 day period prior to

---

Association contract with the Union for a period, January 1965 to February 28, 1968. If the foregoing facts are not supported by the evidence, the Region should so inform the Regional Advice Branch before proceeding on the above authorization.

that expiration date. He gave no notice that he would refuse to sign another Association agreement, nor did he revoke the Association's authorization to bargain in his behalf or give any notice to the Union of his position in this matter.

Finally, with respect to the Employer's contention that, during the negotiations, it thought the contract being negotiated was to take effect upon the expiration of the existing one, it was noted that the Employer, through its attorney, stated: "*Immediately upon his becoming aware that the contract was to be retroactive*, the Employer's owner raised objections to the president of the Association and later to Union representatives." (Emphasis added). The evidence is uncontradicted that Employer owner objections to the Union representatives were made after negotiations were completed and while the Union was attempting to obtain Employer owner's signature on the agreement.[4] However, the Association president states that Employer owner spoke to him "[a]bout May, June or July 1967, . . ." regarding his objections and this would substantiate a conclusion that the Employer was aware, while the bargaining was continuing that such bargaining was for a new contract which would take effect immediately rather than at the end of the existing contract term.

While it appears that no Board cases deal specifically with this issue, consideration was given to the Board's general statements regarding withdrawal from multiemployer bargaining in *Retail Associates, Inc.*, 120 NLRB 388, 393-395:

> The right of withdrawal by either a union or employer from a multiemployer unit has never been held, for Board purposes, to be free and uninhibited,

[4] The new contract was executed by the Union and Association officers on September 11, 1967 for a term, September 1, 1967 to October 15, 1970. Individual employer-member signatures were obtained after September 11, 1967, and futile Union efforts to obtain the Employer's signature continued throughout October and the first of November 1967. This was the first notice the Union had of the Employer's intention to withdraw from the bargaining unit.

> or exercisable at will or whim. For the Board to tolerate such inconstancy and uncertainty in the scope of collective-bargaining units would be to neglect its function in delineating appropriate units under Section 9, and to ignore the fundamental purposes of the Act of fostering and maintaining stability in bargaining relationships.
>
> * * * *
>
> We would accordingly refuse to permit the withdrawal of an employer or a union from a duly established multiemployer bargaining unit, except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations. Where actual bargaining negotiations based on the existing multiemployer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances.

The fact that this case involved a prematurely extended contract was not considered to be such an "unusual circumstance" as to require special treatment. Thus, consistent with the approach taken in *Retail Associates*, it was concluded that where the Employer had *knowledge* during negotiations that some kind of new contract was being discussed by the Association and the Union (rather than simply a contract reopening for a wage adjustment) and where the Employer had an *opportunity to withdraw* at the time of its awareness, it may not wait to express its intention to do so until after bargaining is completed but must withdraw within a reasonable time after learning of the contract negotiations. Accordingly, it was concluded that although the negotiations between the Association and the Union to extend a contract took place about eight months prior to the expiration of that contract, the Employer, in view of its knowledge that a new contract was being discussed,[5] was not privileged to

[5] Even if, contrary to the conclusion reached above, the Employer thought the new contract was to take effect at the termination of

remain silent throughout the negotiations about its intention to withdraw from multiemployer bargaining upon the expiration of the existing contract, and later to exercise this right during the 60-90 day period prior to the original terminal date.[6]

Accordingly, it was concluded that a Section 8(a)(1) and (5) complaint is warranted based on the view that the Employer's withdrawal from the multiemployer unit was untimely and its refusal to sign the agreement reached between the Association and the Union was unprivileged.

G. B.

---

the existing contract, such a belief was not deemed to excuse the Employer's silence; rather, the Employer's awareness that a new contract—regardless of its effective date—was being negotiated was concluded to give rise to the requirement that the Employer promptly announce its decision to withdraw from the multiemployer unit in order to render such withdrawal privileged.

[6] The premature-extension doctrine which would not bar a petition for an election during this period was not considered to require a different result.

December 30, 1971

Re: Western Graphic Arts Union Local 14
(The Standard Register Company)
Case No. 20-03-2521

LETTERS TO PARTIES FORWARDED
VIA CERTIFIED MAIL THIS DATE

John M. Capron, Esq.
Fisher & Phillips
26 Pryor Street
Atlanta, Georgia

Dear Mr. Capron:

Your appeal in the above matter has been duly considered.

The appeal is denied in part and sustained in part. It was concluded that inasmuch as it is well established that peaceful picketing by a minority union to compel recognition as exclusive bargaining agent does not violate 8(b)(1)(A) of the Act, further proceedings with respect to the 8(b)(1)(A) allegation was deemed unwarranted. *NLRB* v. *Drivers Local 639* (Curtis Bros., Inc.), 362 U.S. 274.

However, issues were raised which warranted Board determination with respect to the 8(b)(2) and (3) allegations. Accordingly, the case is remanded to the Regional Director for issuance of an appropriate 8(b)(2) and (3)

complaint, absent settlement. All further inquiries should be addressed the the Regional Director.

Very truly yours,

Peter G. Nash
General Counsel

/s/ Irving M. Herman
Irving M. Herman
Director, Office of Appeals

cc: Director, Region 20

Western Graphic Arts Union Local 14, Attn: Jack McCormick, Pres., 1269 Howard St., San Francisco, California
The Standard Register Company, 2101 Livingston, P.O. Box 23645, Oakland, California
Levy & Van Bourg, Attn: Victor J. Van Bourg, Esq., 45 Polk St., San Francisco, California

CERTIFIED MAIL

[Logo]

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570 March 31, 1972

Re: Beetle Plastics, Inc.
Case No. 16-CA-4627

Mr. Glenn D. Sorrell, Bus. Agent
International Union of Operating Engineers,
Local 670
66 Broadlawn Village
Ardmore, Oklahoma 73401

Dear Mr. Sorrell:

Your appeal in the above matter has been duly considered.

The appeal is denied. For substantially the reasons set forth in the Regional Director's letter of March 10, 1972, insufficient basis existed to establish that the Company had violated the Act in any manner encompassed by the charge. The evidence indicated that when Beetle Plastics took over Ameron's Ardmore operation in October 1971 it began operating it with a majority of its own employees and a few of Ameron's former employees. The evidence was insufficient to establish that its failure to rehire any of the remaining laid off Ameron employees was based on other than economic considerations. In these circumstances, since a majority of the employees employed by Beetle had never worked for Ameron,

Beetle was under no obligation to bargain with the Union as Ameron's successor. See *Tallakson's Ford* 171 NLRB No. 67.

Very truly yours,

Peter G. Nash
General Counsel

By s/ Irving M. Herman
Irving M. Herman
Director, Office of Appeals

cc: Director, Region 16

Richard A. DuRose, Esq., Smith & Schnacke, Talbot Tower, Dayton, Ohio 45402
Beetle Plastics Incorp., Ardmore Industrial Airpark, Ardmore, Oklahoma 73401

CERTIFIED MAIL

Re: Case No. 10-CA-4627

Appeal from a refusal to issue an 8(a)(1)(3) and (5) complaint based on a charge filed by the International Union of Operating Engineers, Local 670, AFL-CIO, alleging in substance that the Company was the successor to Ameron Company, and as such bound by the collective bargaining agreement in existence, and that the Company had discriminatorially refused to hire a number of Ameron's former employees.

NATIONAL LABOR RELATIONS BOARD

[Logo]

OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570 March 24, 1972

Re: Appalachian Power Co.
Case No. 5-CA-5430

Donald G. Logdson, Esq.
Hostler & Logsdon
Suite 401 L & S Bldg.
810 Quarrier St.
Charleston, West Virginia 25301

Dear Mr. Logsdon:

Your appeal in the above matter has been duly considered.

The appeal is denied. There was no evidence that the Company had agreed to a new collective bargaining agreement which included Section 2.3 of the prior contract. Rather, the evidence in companion Case No. 5-CB-1207 was deemed sufficient to establish that the Locals' re-

fusals to execute an agreed-upon contract which excluded Section 2.3 was violative of Section 8(b)(3) of the Act.

Very truly yours,

Peter G. Nash
General Counsel

By /s/ Irving M. Herman
Irving M. Herman
Director, Office of Appeals

cc: Director, Region 5

Appalachian Power Co., 40 Franklin Rd., S.W., Roanoke, Va. 24011
Int'l Bro. of Electrical Workers, AFL-CIO, P.O. Box 6551, Richmond, Va. 23230
I.B.E. Local 1376, c/o W. G. Feazelle, Box 463, Route 5, Roanoke, Va. 24014
I.B.E.W. Local 1182, c/o R. E. Wells, 401 Grove St., Lynchburg, Va. 24501
I.B.E.W. Local 1991, c/o D. C. Wiley, Glen Lyn, Virginia 24093
I.B.E.W. Local 2175, c/o E. E. Wyatt, P.O. Box 485, Lebanon, Va. 24266
I.B.E.W. Local 2235, c/o Kenneth Keatley, 111 Christian Rd., Beckley, W. Va. 25801
I.B.E.W. Local 1884, c/o C. L. Knight, 315 - 5th Ave., Glasgow, W. Va. 25086
(Continued on next page)

CERTIFIED MAIL

GENERAL COUNSEL'S MINUTE

Carpet Layers' Association of Greater Atlanta
Case No. 10-CA-9016

The Thomas Company
Case No. 10-CA-9033

Retail, Wholesale and Department Store Union, AFL-CIO
Case No. 10-CB-2011

Appeal from refusal to issue complaint based on 8(a)(1), (2) and (5) charges filed May 28 and amended June 10, 1971, in CA-9016, and on June 10 in CA-9033 by Carpenters Local 225, alleging in substantially the same language that the Carpet Layers' Association of Greater Atlanta (in CA-9016) and the Thomas Company, a member of the Association (in CA-9033)[1] had refused to bargain with Local 225, induced their employees to select RWDSU, dominated and interfered with the formation of RWDSU, given it financial support and attempted to enter into collective bargaining agreements with it, and discriminated against employees because of their union affiliation; and from refusal to issue complaint based on an 8(b)(1)(A) and (2) charge filed May 28, 1971, by Local 225, alleging that RWDSU had accepted assistance from the Association, permitted the Association to dominate it, and received financial and other assistance from the Association, and caused or attempted

[1] As a result of a Supplemental Investigation, complaint issued on October 1, 1971, in CA-9033, alleging that the Thomas Company had violated Section 8(a)(1) and (2) by interrogating and threatening and supporting RWDSU. Local 225 appealed the failure to issue complaint against Thomas Company based upon the *Midwest Piping* issue, that is, the Employer's recognition of RWDSU in the face of a rival representation claim.

to cause employers to discriminate against employees because of their union affiliation.

ACTION

Appeal as to CA cases denied in respect to 8(a)(5) allegations, and sustained as to 8(a)(1) and (2); sustained in CB-2011.

REASONS FOR ACTION

In view of the evidence, *infra*, that a valid question concerning representation existed with respect to the employees involved herein, insufficient basis existed to warrant a finding that the Association or any of its members had violated Section 8(a)(5) by refusing to bargain with Local 225.

However, issues were raised with respect to the 8(a)(1) and (2) allegations arising out of the relationship between the Association, its member firms and its agents, and the RWDSU, which warranted Board determination on the basis of record testimony. The evidence indicated that a number of the employees of all Employers in the Association were members of Local 225, and although original payment of dues and fees may have been made by the Employers, there was evidence that this money had been repaid by the employees and that they had continued paying dues themselves thereafter. Moreover, the Employers had been deducting dues for these employees for years and making payments for them to the Health & Welfare and Pension funds administered by the Carpenters, and, as recently as February 1971, had met with the Carpenters concerning the employees and the terms of their employment. Further, by the February 17, 1971 letter of the Association's attorney, Currie, the Association on behalf of the Employers had requested that the Carpenters bargain with them. Accordingly, it could not be said that the Employers were not aware of the Carpenters' interest in representing their employees, or that the Carpenters had no such interest.

Nor could it be said that no question concerning representation existed because the Carpenters' request for recognition as representative of the employees was for an inappropriate unit. Association attorney Currie's letter of February 17, which invited the Carpenters to bargain with it, read: "This Association has authorized us to notify you that they are prepared to meet at an early, mutually convenient time for the purpose of negotiating a labor agreement covering the appropriate employees of the Association." Therefore, when the Carpenters responded to the Association by telegram of May 27, demanding recognition, the Association could not ignore this request on the basis that it was for an inappropriate unit, since it was for the unit for which the Association had invited bargaining. And the language used in the demand, to wit, ". . . a majority of the carpet layers employed by employer members of the Carpet Layers Association," could not be read as limited to members of the Carpenters doing non-residential work simply because the Carpenters had previously by oral agreement, represented only such employees. In these circumstances, the Employers were faced with rival claims for recognition and were obligated under the *Midwest Piping* doctrine to refrain from recognizing either Union until the bargaining representative could be determined by the Board; and the fact that RWDSU had cards from a majority of employees would not warrant a contrary conclusion, even absent the evidence here that at least some of them had been obtained through coercion. See *American Bread Company*, 170 NLRB 85. Accordingly, recognition of RWDSU and the negotiation of collective bargaining agreements with it violated Section 8(a)(1) and (2) of the Act.

The evidence further indicated that the Association, its constituent members, and its agent Currie[2] were bound together in this joint course of conduct which was calculated to deny employees their rights under Section 7 of the Act. The Association appeared to be the

[2] Footnote deleted as internal procedural instructions dealing solely with practices within the Agency which does not affect the public or the parties involved.

guiding force. It was the Association's attorney who solicited RWDSU's interest on behalf of the Association members and who provided it with the names of employees in each firm who would serve as contacts for organization. The Association's attorney answered the Carpenters telegram of May 27, 1971, speaking for the member firms, and negotiations between RWDSU and the Employers were conducted jointly, with the Association's attorney representing the Employers, and with substantially identical contracts resulting. Thus, even though the Association did not enter into a contract with RWDSU, it was as a result of its efforts that the individual members did. Accordingly, a complaint alleging a *Midwest Piping* violation of Section 8(a)(1) and (2) by the Association and its members was deemed warranted. *Teamsters Local 386*, 145 NLRB 1475.[3] Additionally, the evidence supported the conclusion that the direct assistance given RWDSU by the Thomas Company (already the subject of complaint in Case 10-CA-9033 in respect to such conduct) and the similar conduct on the part of Wilson were in furtherance of the overall scheme of support of RWDSU initiated by the Association in behalf of its member employers and thus was attributable to all. Accordingly, the complaint should also allege the conduct by both Thomas and Wilson as an integral part of the course of conduct begun by the Association.

Finally, in view of our conclusion that the Association and the Employers violated Section 8(a)(1) and (2) by unlawfully assisting and recognizing RWDSU, it would follow that the Union violated Section 8(b)(1)(A) by receiving and enjoying the benefits of such assistance.

---

[3] The amended charge in Case No. 10-CA-9016 was deemed broad enough in language and scope to support issuance of complaint against the Association and its member firms. Thus, while the charge named only the Association as the charged party, the body of the charge alleged that "[t]he employers have induced and encouraged . . . and have dominated and interfered . . ." and then listed all the members of the Association. Moreover, copies of the charge were * * *.

Connie Jean, Inc., 162 NLRB 1609; see also *Garment Workers Union* (Bernhard-Altmann Texas Corp.), 122 NLRB 1289, affirmed 366 US 731.

/s/ P. G. N.
Peter G. Nash
General Counsel

Dated: 12-17-71

GENERAL COUNSEL'S MINUTE

American National Stores, Inc.

Case No. 14-CA-6136

Appeal from refusal to issue complaint as to that part of an amended 8(a)(1), (3) and (5) charge filed April 20, 1971, by Retail Store Employees' Union, Local 655, which alleged that since about February 12, 1971, the Company had refused to recognize and bargain with the Union which is the exclusive representative of the unit employees and unilaterally increased commissions, transferred employees and promised benefits to employees to discourage Union membership.[1]

ACTION

Appeal sustained as to the 8(a)(5) allegation and denied as to the 8(a)(1) and (3) allegations.

REASONS FOR ACTION

With respect to the 8(a)(1) and (3) allegations raised on appeal, insufficient basis existed to warrant a finding of violation.

As to the transfer to another store of leading Union advocate Butler, the evidence indicated that Butler first made his request for transfer to St. Louis in the late fall of 1970, long before the Union organizational activity in February 1971, and repeated the request thereafter, and that the timing of the transfer was caused by slow business and the resulting unavailability of a position in St. Louis until early 1971. Moreover, when Butler was

[1] The outstanding complaint alleges the following 8(a)(1) violations: the store manager told an employee he would run the store the way he wanted to and a union would make no difference; store manager told an employer that if the Union got in, no one would receive commissions on sales made by management; Company granted a benefit by implementing a change in distribution of commissions on sales by the manager.

notified of the opening he was asked if he still wanted to transfer and thus was given the option of not accepting it.

With respect to the transfer of the alleged anti-union employee Wood into the Rolla Store, the evidence indicated that Wood was transferred after the store where he had been General Manager was closed and that under the Company's policy of having two assistant managers in each store, the Rolla store was officially one man short before the transfer. Accordingly, it could not be established that the purpose of either transfer was to undercut the Union's majority.

As to the 1% increase in commissions for "O" category sales, the evidence indicated that the Company decided to increase the commissions for this category of sales before the Union made its demand for recognition, the increase was applicable to all stores without collective bargaining agreements, and the Company had announced the increase to employees at its store in Columbia, Missouri, one day before the Union made its demand.

However, in light of the conduct alleged as violative of 8(a)(1) in the outstanding complaint, the Company's refusal to recognize and bargain with the Union raised issues warranting Board determination on the basis of record testimony.

The outstanding complaint alleges that a Company representative created the impression of futility in selecting a bargaining agent by telling an employee he would run the store the way he wanted and a Union would make no difference; a Company representative threatened to withhold benefits by telling an employee that if a Union got in no one would receive commissions on sales made by management; and the Company granted a benefit by announcing to employeees and implementing a change in the method by which commissions on sales by the manager were distributed to employees in order to discourage Union activity. Moreover, the evidence established that this conduct occurred after three of the four employees in the unit had executed authorization cards, and the Company had refused the Un-

ion's demand for recognition and bargaining. Accordingly, in view of the small size of the unit, the Company's alleged conduct was deemed so pervasive and coercive at the time of its occurrence as to make a fair election doubtful, if not impossible. The facts that since the conduct in question there has been employee turnover and the employer apparently has refrained from committing new unfair labor practices would not warrant a contrary conclusion. See *Gibson Products*, 185 NLRB No. 74, slip opinion pp 3-5, where the Board stated:

> In *Gissel*, the Supreme Court affirmed, without qualification, the settled principle that a bargaining order is not rendered inappropriate by the circumstances that a union has, or may have, lost its majority status between the time of the commission of the employer's unfair labor practices and the Board's decision.
>
> * * * *
>
> . . . the Court held that the Board could properly impose a bargaining order even though the Union may not in fact represent a majority of the current employee complement. It follows, therefore, that in determining whether the employer's unfair labor practices are of such a nature as to preclude a fair election and thus necessitate a bargaining order based on a past card showing of a majority status, the situation must be appraised as of the time of the commission of the unfair labor practices, and not currently.

Accordingly, the case was remanded to the Regional Director for the issuance of an appropriate amended complaint, alleging a violation of Section 8(a)(5) of the Act, absent settlement.

/s/ A. O.
Arnold Ordman
General Counsel

Dated: 1-4-71.

[Caption omitted in Printing]

NOTICE OF APPEAL

Notice is hereby given that the defendants appeal to the United States Court of Appeals for the District of Columbia Circuit from the Memorandum and Order entered on the 10th day of August 1972 granting plaintiff's motion for summary judgment, denying defendants' cross motion for summary judgment and ordering defendants to make available to the public pursuant to the Freedom of Information Act 5 U.S.C. 552, various internal memoranda and documents.

Respectfully submitted,

Marcel Mallet-Prevost
Assistant General Counsel

By /s/ Glen M. Bendixsen
Glen M. Bendixsen
Chief of Special Litigation
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20570
Telephone: (202) 254-9221

Co-counsel: Charles N. Steele
(Ext. 9352)
Alan D. Cirker
(Ext. 9288)

SUPREME COURT OF THE UNITED STATES

No. 73-1233

NATIONAL LABOR RELATIONS BOARD, ET AL., PETITIONERS

v.

SEARS, ROEBUCK & CO.

ORDER ALLOWING CERTIORARI—Filed May 28, 1974

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is set for oral argument in tandem with No. 73-1316.

Mr. Justice Powell took no part in the consideration or decision of this petition.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 552709 3